Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MICKY A. SMITH And J. SCOTT BROWN, *Et Al.*,

Petitioners,

V.

FORD MOTOR COMPANY, *Et Al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the 7th and 14th Amendments permit jury deliberations to be tainted by the foreman, who draws upon his professional experience to (a) present mathematical equations not offered into evidence and (b) perform an experiment for his subordinate jurors using an exhibit not offered into evidence, and another juror who (c) informs his fellow jurors about alleged federal regulations not offered into evidence or instructed upon, each of which actions (d) contradicts evidence and testimony presented at trial concerning the pivotal issue in the case, thereby (e) transforming a verdict for the plaintiffs into one for the defendants?

PARTIES TO THE PROCEEDING

Petitioners in this case are: Micky a. Smith and J. Scott Brown (Plaintiffs), as Co-Personal Representatives of the Estate of Elizabeth Ashley Smith, Deceased, and the Estate of Noah Scott Smith, Deceased, and J. Scott Brown, as Personal Representative of the Estate of Thomas Ashton Brown, Deceased; and Marcus Allen Austin (Intervenor-Plaintiff), as Independent Executor of the Estates of Milton Andrew Austin and Thelma Susie Austin.

Respondents in this case are Defendants: Ford Motor Company, a Delaware Corporation; Reynolds Ford, Inc., an Oklahoma Corporation; and Five Star Ford, Inc., an Oklahoma Corporation.

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OPINIONS BELOW

The opinion of the Oklahoma Court of Appeals is unpublished. It is reproduced in the Appendix ("App.") at 1a-24a. The Oklahoma Supreme Court did not write an opinion. Its summary order is reproduced at App. 25a.

JURISDICTION

The order of the Oklahoma Supreme Court denying certiorari was issued on February 17, 2009. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTE INVOLVED

This appeal centers upon 12 Oklahoma Statutes §2606(B), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or

whether any outside influence was improperly brought to bear upon any juror.

STATEMENT OF THE CASE

A. Factual Background

On July 26, 2003, Thomas Ashton Brown was driving his sister, Elizabeth Ashley Smith, and her 2-year-old son, Noah Scott Smith, to Crested Butte in a 2001 Ford Expedition, which Mrs. Smith had bought just two days earlier. While traveling at a reasonable highway speed in the westbound lane of U.S. Highway 64/87 in Raton, New Mexico, the Expedition suddenly crossed the centerline and was struck by a 2000 Ford F-250 long bed pickup, which was towing a fifth-wheel trailer. The force of the collision caused the Expedition to reverse course and roll over, and the pickup to burst into flames, resulting in the deaths of all three occupants of the Expedition, as well as the occupants of the pickup, Milton Andrew and Thelma Susie Austin. [*Petition*; *Amended Petition in Intervention*; Tr. Vol. 11, pp. 1317-1328; Tr. Vol. 35, p. 5050, l. 19 to p. 5051, l. 3]

B. Proceedings Below

Petitioners asserted various claims against (a) Ford Motor Company as the manufacturer of the Expedition, (b) Reynolds Ford, Inc., which sold the Expedition to Micky and Elizabeth Ashley Smith, and (c) Five Star Ford, Inc., which last serviced the Expedition.

At trial Petitioners proved that, at 24,000 miles (March 2003), a mechanic at Five Star Ford replaced the outer bearings on the *right* front wheel of the Expedition because they were pitted. He also noted that the bearings on the *left* front wheel were loose, but he did not use a dial indicator to ascertain the amount of looseness (Tr. Vol. 13, p. 1566, l. 1 to p. 1568, l. 16, p. 1590, l1 to p. 1593, l. 5 and p. 1594, ll. 1-5; Tr. Vol. 14, p. 1747, ll. 1-22). Though he did not replace the left front bearings, he wrote on the work order that he had done so (Tr. Vol. 13, p. 1568, ll. 13-15, p. 1579, ll. 6-19, and p. 1582, l. 8 to p. 1586, l. 15). Thus, when the original owner of the Expedition asked specifically if the left front bearings had been replaced, Five Star assured her they had been (Tr. Vol. 14, p. 1780, ll. 22-5 and p. 1792, ll. 1-4). No one at Reynolds or Five Star advised the original owner to bring the Expedition in for a 30,000-mile checkup, at which time either dealership would have routinely checked all wheel bearings (Id., p. 1780, ll. 9-18). When Micky Smith and his wife went to Reynolds Ford to purchase a pre-owned vehicle on July 24, 2003, the Expedition was sitting almost directly beneath a banner that advertised "Quality Checked," and the salesman assured them that the Expedition was in "mint condition." [Tr. Vol. 15, p. 1979, l. 1976, l. 22 to p. 1981, l. 3; Tr. Vol. 21, p. 2974, l. 23 to p. 2975, l. 4; p. 2977, ll. 2-21 and p. 2997, ll. 5-16] A "Quality Checked" vehicle undergoes a comprehensive, 115-point inspection that is performed only by Ford-certified mechanics (Tr. Vol. 14, p. 1826, ll. 4-12). Even though the Smiths bought the most expensive warranty-extension package available, the only type of inspection they got was a

so-called "multipoint" inspection: whoever was available (certified or not) performed an "eyeball" check of fluid levels, belts and hoses (Tr. Vol. 15, p. 1904, l. 5 to p. 1905, l. 18; p. 1938, ll. 7-13 and p. 1986, ll. 1-20; Tr. Vol. 23, p. 3268, l. 1 to p. 3271, l. 6).

The tapered roller bearing in the left front wheel of the subject Expedition was invented by Henry Timken over a century ago, and The Timken Company has been producing them ever since (Tr. Vol. 28, p. 3960, ll. 4-20). Anthony Skipper, General Manager of Quality and Technical Standards for The Timken Company, testified: (a) bearing failure can adversely affect the performance of the wheel, as well as the effectiveness of the brakes (Id., p. 4026, ll. 7-21); (b) a dial indicator should be used to check bearings for unusual wear (Id., p. 4029, l. 15 to p. 4031, l. 3); (c) bearings should not get loose under normal conditions (Id., p. 4034, ll. 3-13) and (d) improperly setting the bearings at the factory will lead to premature damage at 24,000 miles (Id., p. 4089, l. 14 to p. 4090, l. 1). Mr. Skipper's testimony (a) confirmed the opinions of Petitioners' experts on these subjects (Tr. Vol. 16, p. 2101, l. 7 to p. 2102, l. 3 and p. 2106, l. 24 to p. 2107, l. 2; Tr. Vol. 17, p. 2342, l. 18 to p. 2343, l. 15, p. 2345, ll. 1-24, and p. 2361, l. 16 to p. 2363, l. 7; Tr. Vol. 18, p. 2516, l. 23 to p. 2518, l. 2; and Tr. Vol. 20, p. 2818, ll. 1-14 and p. 2833, l. 1 to p. 2834, l. 2) and (b) corroborated fact testimony of employees for Reynolds and Five Star (Tr. Vol. 13, p. 1579, l. 25 to p. 1581, l. 3; and p. 1593, l. 15 to p. 1594, l. 10; Tr. Vol. 14, p. 1647, l. 6 to p. 1648, l. 12 and p. 1690, ll. 10-15; Tr. Vol. 15, p. 1910, ll. 12-18; Tr. Vol. 23, p. 3300, l. 10 to p. 3301, l. 12).

Among other things, Petitioners also proved: (a) in 1998, Ford's Critical Concern Review Group was aware of a wheel bearing failure rate of 25% (Tr. Vol. 19, p. 2551, l. 1 to p. 2563, l. 23); (b) prior to this accident, customers had made no less than 2,742 separate warranty complaints for failed bearings in Ford light trucks (Tr. Vol. 19, p. 2606, ll. 8-21; Tr. Vol. 35, p. 5062, ll. 8-12); and (c) this accident was precipitated by a pre-collision fatigue failure of the left front wheel bearings, which caused the Expedition to veer left uncontrollably (Tr. Vol. 17, p. 2298, l. 13 to p. 2299, l. 16, p. 2349, ll. 6-25, p. 2371, l. 4 to p. 2372, l. 2, and p. 2378, l. 8 to p. 2380, l. 2; Tr. Vol. 18, p. 2418, l. 21 to p. 2423, l. 25).

Experts on both sides of the case agreed that: (a) the 3:1 weight ratio between the vehicles, which resulted in the F-250 shoving the Expedition back 29 feet, rendered this an extremely violent collision (Tr. Vol., 16, p. 2043, l. 21 to p. 2046, l. 14 and p. 2058, ll. 1-9; Tr. Vol. 26, p. 3677, ll. 9-22 and p. 3693, l. 11 to p. 3696, l. 15; Tr. Vol. 29, p. 4126, ll. 1-6); (b) the metal used in wheel bearings is the hardest metal used in a motor vehicle (Tr. Vol. 17, p. 2329, ll. 18-24; Tr. Vol. 18, p. 2400, ll. 1-12; Tr. Vol. 29, p. 4123, ll. 10-13); (c) **the *right* front wheel bore the brunt of the impact with the F-250, thereby suffering a massive amount of damage** (Tr. Vol. 16, p. 2096, ll. 13-19 and p. 2111, l. 21 to p. 2112, l. 9; Tr. Vol. 17, p. 2302, ll. 3-12 and p. 2319, l. 14 to p. 2320, l. 17; Tr. Vol. 26, p. 3644, ll. 11-19, p. 3647, ll. 9-11, p. 3649, l. 24 to p. 3650, l. 23, p. 3662, l. 18 to p. 3663, l. 4, p. 3679, l. 22 to p. 3680, l. 4 and p. 3697, l. 2 to p. 3698, l. 5; Tr. Vol. 27, p. 3785, ll. 4-5, p. 3816, l. 8 to p. 3819, l. 24; Tr. Vol. 30, p. 4227, ll. 1-24); (d) **by**

contrast, the *left* front wheel suffered such little impact damage that, except for the fractured bearings, it remained drivable (Tr. Vol. 16, p. 2061, l. 3 to p. 2062, l. 2, p. 2065, ll. 18-20 and p. 2227, ll. 4-9; Tr. Vol. 17, p. 2321, l. 15 to p. 2322, l. 7; Tr. Vol. 27, p. 3814, ll. 4-25, p. 3815, l. 12 to p. 3816, l. 4, p. 3874, l. 24 to p. 3875, l. 3 and p. 3886, ll. 15-18; Tr. Vol. 30, p. 4227, l. 25 to p. 4228, l. 7); (e) **the *right* front wheel bearings were not even cracked by this savage impact, let alone broken** (Tr. Vol. 17, p. 2325, l. 15 to p. 2326, l. 1 and p. 2329, ll. 2-17; 30, p. 4225, ll. 7-11; Tr. Vol. 32, p. 4538, ll. 6-14); and (f) **neither the combined personal experience of these experts nor the decades of scientific testing performed by Ford and other automotive entities produced a single real-world instance of wheel bearings being fractured by a vehicular collision** (Tr. Vol. 16, p. 2225, l. 4 to p. 2226, l. 5; Tr. Vol. 17, p. 2326, ll. 1-21; Tr. Vol. 20, p. 2838, l. 22 to p. 2840, l. 19; Tr. Vol. 27, p. 3881, ll. 11-22; Tr. Vol. 32, p. 4549, l. 5 to p. 4551, l. 18).

The entire case turned upon this vast incongruity between the forces that acted upon the right and left front wheels (Tr. Vol. 18, p. 2398, l. 4 to p. 2399, l. 13), a disparity that was quite apparent to any casual observer (Plaintiffs' Exhibits 161.9 & 161.10; Tr. Vol. 20, p. 2925, ll. 15-25). In an attempt to divert the jurors from such obvious facts, Respondents argued that the bearings in the left front wheel fractured, not at the point of impact between the Expedition and the F-250 (where the laws of physics dictate that the forces were at their peak), but when it hit the ground (not pavement, but

dirt and grass) during the rollover (at which point most of the energy of the initial collision had dissipated) (Tr. Vol. 25, p. 3573, l. 5 to p. 3574, l. 13; Tr. Vol. 27, p. 3807, ll. 5-7; Tr. Vol. 31, p. 4454, ll. 8-18). So untenable was this position that it caused Respondents' expert on metallurgy to: (a) reverse his position on the possible causes of *brinell* marks (telltale signs of metal fatigue) after Appellants' expert had performed a simple demonstration on rebuttal (Tr. Vol. 29, p. 4132, ll. 12-14 and p. 4134, ll. 13-21; Tr. Vol. 33, p. 4605, l. 18 to p. 4607, l. 17 and p. 4710, ll. 3-6); (b) stumble all over himself when asked to explain his theories in light of contradictory physical evidence (Tr. Vol. 30, p. 4232, ll. 16-24, p. 4234, l. 15 to p. 4236, l. 9, p. 4240, ll. 5-11 and p. 4258, l. 19 to p. 4259, l. 8); (c) defy the metallurgical findings of The Timken Company itself (Id: p. 4292, l. 2 to p. 4293, l. 5; p. 4297, l. 23 to p. 4298, l. 9; and p. 4334, ll. 5-15); and (d) disregard the procedures Timken recommends for investigating bearing failures (Id., p. 4295, l. 17 to p. 4297, l. 22).

The key to resolving the controversy was to understand what happens when bearings fail (*e.g.*, what damage they cause, what marks they leave, etc.). The housing that contains the bearings at issue is called a "race." The race in the left front wheel of the Expedition bore a 180-degree crack on both sides (Tr. Vol. 29, pp. 5-13). Petitioners' metallurgy expert testified that such a symmetrical crack can only be caused by the gradual process of fatigue failure in the bearings over time (Tr. Vol. 18, p. 2420, l. 2 to p. 2423, l. 5). **Respondents' expert was unable to rebut this evidence; though he performed multiple drop-tower tests on identical bearing**

assemblies, he was unable to produce a crack on both sides of the race with localized impacts (Tr. Vol. 29, p. 4181, l. 1 to p. 4183, l. 3, p. 4186, l. 20 to p. 3, p. 4193, l. 20 to p. 4194, l. 1; Tr. Vol. 30, p. 4320, l. 24 to p. 4321, l. 9, p 4331, l. 7 to p. 4332, l. 18).

When the jurors focused solely upon the evidence presented at trial, the majority favored a verdict for Petitioners (New Trial Hrg., p. 188, ll. 13-17) until Foreman Melton twisted a nearby soup or beverage can ("tin-can") on his arm to show a symmetrical, 180-degree mark (Id: p. 62, ll. 3-18; p. 117, l.7 to p. 119, l. 20; p. 125, l. 25 to p. 126, l. 4). Mr. Melton, an airplane mechanic (Id., p. 51, ll. 20-24), then devised mathematical equations and conducted a seminar on force vectors to convince his subordinate jurors of something Respondents' expert (an engineer with a Ph.D. in Theoretical and Applied Mechanics since 1979) had failed to prove – that the only way the subject bearings could have fractured was by impact (Id., p. 39, ll. 19-23; p. 41, ll. 10-12; p. 42, ll. 13-17; p. 44, ll. 12-17; and, p. 46, ll. 11-16 and ll. 22-24). So proud was Foreman Melton of his coup that he bragged:

> A – "If I or Mr. Crane were not on the jury, they, the plaintiff, could have won." [Id., p. 173, ll. 20-21]

For his part in the coup, from reading he had done outside of trial and deliberations while employed as a mechanic, Mr. Crane testified to his fellow jurors that government regulations required

the use of a dial indicator only in response to incidents of wheels coming off tractor-trailers and causing injury (New Trial Hrg: p. 120, ll. 12-16 and l. 24 to p. 121, l. 22; p. 129, l. 24 to p. 130, l. 17). Juror Crane used this extraneous information to buttress his argument that dial indicators were generally not required for passenger cars (Id., p. 122, ll. 17-25). Foreman Melton confirmed that no testimony was presented at trial concerning these alleged industry regulations (Id., p. 123, ll. 11-21). It was only after Foreman Melton and Juror Crane injected their extra-record testimony into deliberations that the vote swung toward Respondents (Id., p. 157, ll. 6-17 and p. 173, ll. 19-25) and the jury delivered a defense verdict.

The trial court denied Petitioners' motion for a new trial. The Oklahoma Court of Appeals affirmed ("Oklahoma Decision"), concluding that the actions of Foreman Melton and Juror Crane did not rise to the level of "extraneous prejudicial information" or "outside influence" contemplated by 12 O.S. 2002 §2606(B), despite Foreman Melton's testimony that these actions materially altered the verdict:

> There is no evidence suggesting that any of the jurors here brought any outside materials into the deliberations, nor were any improper independent experiments performed. [App., p. 8a]
>
> Oklahoma law is clear that a juror's own experience and background does not constitute "extraneous prejudicial

> information," which would improperly impact a jury's verdict. Rather, "extraneous prejudicial information" is that which is "information injected into the deliberation process *from the outside*." [Id., p. 9a; citations omitted]

The Oklahoma Supreme Court denied certiorari (Id., p. 25a), thereby ratifying the decision and reasoning of the lower appellate court.

REASONS TO GRANT THIS PETITION

I. The Constitutional Right to a Fair and Impartial Jury is under Assault by Agenda-Driven Jurors

The right to have one's claims tried by a fair and impartial factfinder has been called "one of the pillars of due process". [*ESSO Standard Oil Co. (Puerto Rico) v. Mujica Cotto*, 327 F.Supp.2d 110, ¶8 (D. Puerto Rico 2004), affirmed 389 F.3d 212] This right applies with equal force in civil trials. [*Marshall v. Jerrico, Inc.*, 446 U.S. 238, ¶1 (C.A.10 Colo. 1980)]

In *Skaggs v. Otis Elevator Co.*, 164 F.3d 511 (C.A.10 Okla. 1998), the court held:

> Although the Seventh Amendment does not contain language identical to that found in the Sixth Amendment ... the right to a jury trial in a civil case would

> be illusory unless it encompassed the right to an impartial jury. [Id., ¶3]
>
> [The] denial of trial by an impartial jury is also the denial of due process...." [Id.; Quoting *Casias v. United States*, 315 F.2d 614, 615 (10th Cir. 1963) (*en banc*)]

It is a longstanding rule of law that, if a juror would ignore jury instructions or evidence in favor of her own agenda, she is unfit for duty. Thus, in *Morgan v. Illinois*, 504 U.S. 719 at ¶11 (1992), this Court held that a juror who was prepared to impose the death penalty without considering mitigating factors was removable for cause. Likewise, the court in *U.S. v. Wilson*, 493 F.Supp.2d 415 at ¶5 (E.D.N.Y. 2006), declared removable for cause a juror whose bias in favor of political minorities "indicates that he is unduly influenced by popular culture and stereotypes". And in *U.S. v. Parker*, 133 F.3d 322 at ¶9 (C.A.5 La. 1998), the court affirmed the removal of a juror who admitted that a family member's recent criminal conviction would cloud his view of the evidence.

In 2002, Trent Hammerstein wrote a book titled "Stealth Juror – The Ultimate Defense Against [*sic.*] Bad Laws and Government Tyranny" (Paladin Press) in which he openly encourages his readers to (a) lie during *voir dire* to get themselves impaneled and then, during deliberations, (b) ignore the evidence and jury charges in favor of their own agenda. Suffusing the book is an almost rabid suspicion of trial judges based primarily on their role

in excluding inadmissible evidence. Though the author's stated concern is limited to criminal defendants, one needs no imagination to discern the impact stealth jurors inspired by the following battle cries are having on civil trials:

> Technically, lying on a voir dire form is a felony. [text omitted]
>
> In my opinion, in some cases you have a moral and ethical right to lie .... [Id., p. 51]

> So at the beginning of the trial, when you are forced to take an oath to obey the judge's instructions (which he really doesn't have the right or power to give), just nod, mouth the words you're told to, and mentally cross your fingers, because the judge will almost always make you promise to obey his instructions, even over your own conscience or feelings. [Id., pp. 56-7]

> The first thing to do in the jury room is try to get yourself elected foreman, forewoman, foreperson, or whatever they call it. [Id., p. 74]

> [The judge's jury instructions] are generally invalid and improper no matter how many judges say they aren't because the jury, not the judge, is the final arbiter of guilt or innocence. [Id., p. 75]

Finally, some subject headings in his chapter titled "What You Can Do to Fix the System Even if You're Never on a Jury" are "Establish Citizen Oversight Panels to Control Judges", "Drastically Reduce the Power of Judges" and "Strictly Limit the Voir Dire Process".

The "stealth juror" movement has gained such ground that it prompted Dan Abrams (host of *Abrams Report*) to address it on April 2, 2004. In a segment titled "Runaway Jury", Phillip Anthony, a jury consultant with VisionQuest, referred to the O.J. Simpson murder trial as a watershed event for jury behavior: "The lightbulb went on for a lot of folks that if they ended up being selected as a juror, it could be an opportunity to engage in some form of social engineering." Later in the piece, he added: "Usually, they've experienced something personally that causes them to want to put forward their agenda."

Whether we label them "stealth" or "activist," jurors who ignore jury instructions and evidence in favor of their own agenda are anathema to fundamental due process. Because such jurors are schooled by the above referenced book – and web sites such as www.fija.org – in ways to evade detection, often the only way to uncover them is to (a) analyze the effect they had on a verdict after that verdict has been delivered by (b) delving into the objective facts of what was said and done behind the closed door to the jury room.

II. The Oklahoma Decision Conflicts with Other State Supreme Courts on the Interpretation of "Extraneous Prejudicial Information"

The Oklahoma Decision restricts the scope of "extraneous prejudicial information" to a physical object brought into the jury room and information gleaned from an experiment or research a juror performs (a) independently of the other jurors and (b) outside the jury room. Petitioners submitted below that this interpretation improperly shifts the focus of Rule 2606 from the courtroom to the jury room.

In *Tanner v. U.S.*, 483 U.S. 107 at ¶1 (1987), this Court held that drug use and intoxication did not qualify as extraneous information under Fed. R. Civ. P. Rule 606(b). Yet this Court recognized that the act of sharing extraneous information did not have to occur outside the jury room to so qualify (Id. at 117-18). If the sharing of extraneous information can occur inside the jury room, it follows that the extraneous information itself may also originate there. Thus, in *State v. Thacker*, 596 P.2d 508 at ¶3 (Nev. 1979), a new trial was granted when the jury foreman, a cattle ranch superintendent, calculated the estimated original weight of calves being held in impound. Defendants, accused of stealing the calves at issue, alleged that the calves impounded were not the same as those allegedly stolen, because the former were smaller. [Id.] It is notable that the foreman performed his calculations (a) during deliberations (b) in direct response to a question that arose as to the weight of the calves, which (c) "was a

fact critical to respondents' case." [Id.] Furthermore, the foreman's calculations had a material impact on the verdict. [Id., fn. 1] In affirming the grant of a new trial, the court held:

> It is likewise a fundamental principle that in reaching their verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings. [Id., ¶2]
>
> The **unsworn testimony of a juror** as to a fact which is relevant to the determination of an issue before the jury constitutes misconduct in itself. [Id.; citation omitted; emphasis added]

In the case at hand, Foreman Melton performed his mathematical computations and tin-can experiment to convince his subordinate jurors of his theory regarding how the forces of the collision must have acted on the wheel bearings, contrary to the sum of evidence presented at trial. Thus, had Petitioners' appeal been filed in Nevada rather than Oklahoma, a new trial would certainly have been granted based on this misconduct.

In *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So.2d 1138 (Miss. 2007), a juror's relative was a resident of the defendant nursing home. That juror told other jurors that, if the relative received poor care, so did the plaintiff. The trial court denied defendant's new trial motion. The court reversed, holding:

> A new trial is appropriate only when the jury received facts that concern a material issue in dispute and they are qualitatively different from the evidence admitted at trial. [Id. at 1146; citations omitted]

In the present case, Juror Crane injected into deliberations an alleged body of federal regulations he recalled from working as a mechanic (a) outside the jury room and (b) prior to the trial. This fact which he imparted to the other jurors directly contradicted expert testimony on the material issue of whether a dial indicator should be used to check wheel bearings in passenger vehicles. Such conduct would have qualified as "extraneous prejudicial information" in Mississippi.

In *Brockie v. Omo Const., Inc.*, 844 P.2d 61 (Mont. 1992), plaintiff's deceased slid into a flasher board placed on the roadway by a construction crew. The location of the flasher board was critical to the case – were it proved to be within 30 feet of the roadway, defendant would be in violation of a highway safety standard. The defendant's reconstruction expert testified that the board must have been 34-48 feet away, based on motion theory and kinematics. The plaintiff relied on the measurements taken at the accident scene by an investigating trooper which placed the board at 27 feet 2 inches from the centerline. [Id. at 63] To "refresh his memory" on physics courses he had taken in college, the jury foreman ("Rice") went to the local

library and did his own research on motion theory and kinematics. During deliberations, he told his subordinate jurors that his weekend research confirmed the testimony of the defendant's expert. [Id.] The court held that this research affected the plaintiff's rights:

> ...for any statements by Rice in the jury room relative to the placement and positions of the sign, [*sic.*] could in effect **make Rice a witness as to those jurors** to whom he mentioned his research. [Id. at 64-5; emphasis added]

In *Pennell v. Keene Brothers Trucking, Inc.* [589 So.2d 965 (Fla. App. 2 Dist. 1991), reversed on other grounds, 614 So.2d 1083 (Fla. 1993)], while calculating damages in deliberations, a juror utilized information from one page of an accounting book that was not in evidence (Id. at 966). The court held:

> A juror is not permitted to **become a witness in the jury room by importing [*sic.*] his knowledge** to other jurors. Under the circumstances in this case, the trial court was correct in granting a new trial on the ground of juror misconduct. [Id. at 967; citation omitted; emphasis added]

In the case at bar, Foreman Melton made himself an unsworn witness to the other jurors when he utilized his own specialized knowledge of physics, gathered outside the jury room, to rehabilitate

Respondent Ford's expert on the pivotal issue of what caused the bearings to fracture. Juror Crane did the same when he introduced the alleged federal regulations. The only difference between their acts of misconduct and that which occurred in *Brockie* (844 P.2d 61) is that Messrs. Melton and Crane did not amass their extra-record knowledge *during the trial.* Even so, regardless of when or where they obtained the knowledge, the fact remains that they (a) disclosed this extra-record evidence to their fellow jurors (b) without affording Respondents an opportunity to challenge or cross-examine it.

Appellate law is replete with cases holding that it is prejudicial misconduct for a juror to perform an experiment and divulge her findings to the other jurors. [*Wilson v. Vermont Castings*, 977 F.Supp. 691, 695 (M.D. Pa. 1997)] Petitioners submit that it is insignificant to our analysis where or in whose presence such an experiment is conducted. Rather than sneak away to a dark corner and perform the tin-can experiment, Foreman Melton simply conducted it in the jury room for all to see. The result in either scenario is the same: an unauthorized experiment has poisoned the jury's verdict. The Supreme Court of Montana appreciates this simple logic; its sister court in Oklahoma does not.

In *Saucedo v. Winger, M.D.*, 850 P.2d 908 (Kan. 1993), the court ruled that a juror's statement to other jurors regarding an unsubstantiated rumor that the decedent in a medical malpractice case may have suffered a cocaine overdose constituted misconduct:

> [I]t is the duty of the jury to make its findings upon evidence regularly introduced in the trial and not upon the **personal knowledge of jurors.** [Id. at 914; emphasis added]

> [I]f facts outside of the evidence are brought before the jury based on the **personal knowledge** of a juror and those facts are likely to have influenced the minds of the other jurors, the verdict should be set aside. [Id.; emphasis added]

> A party is denied the right to a fair trial when a juror introduces **evidence on material issues of fact** to the jury during its deliberations. [Id. at 919; emphasis added]

It is notable that the highest courts of Tennessee and Colorado have held that the introduction of the Bible and/or citing biblical references during deliberations constitute prejudicial misconduct. [*State of Tennessee v. Harrington*, 627 S.W. 2d 345, 350 (Tenn. 1981); *People v. Harlan*, 109 P.3d 616 at ¶11 (Colo. 2005)] The fact that, in Western society, exposure to biblical passages is within the personal experience of an overwhelming majority of potential jurors provides a stark contrast to the reasoning put forth in the Oklahoma Decision on the subject of a juror's personal experience and background.

A common thread among all of these State cases is that, regardless of when or where a juror's specialized knowledge is garnered, and regardless of whether it may be characterized as personal or professional, if (a) the juror communicates to his fellow jurors a fact that was not placed into evidence and (b) that fact bears on a material issue in the case, "extraneous prejudicial information" has infected the jury's verdict. In other words, these cases instruct that Rule 2606(B) is properly read in the following context:

> A juror may testify on the question whether [prejudicial information extraneous to the trial process] was improperly brought to the jury's attention or whether any [influence outside of the trial process] was improperly brought to bear upon any juror.

Finally, in *Buisker v. Thuringer*, 648 N.W.2d 817 (S.D. 2002), the court set forth the last element of inquiry in juror misconduct analyses:

> **... whether the extraneous matter had a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the evidence** and the instructions of the court. [Id. at ¶12; emphasis added; citation omitted]

In the case at hand, the facts are conclusive that Foreman Melton and Juror Crane used their influence to procure a verdict that is diametrical to the evidence presented at trial.

CONCLUSION

Though Foreman Melton could never have qualified as an expert in metallurgy, and though Juror Crane could never have qualified as an expert on industry regulations or how to detect loose bearings, both were allowed to testify before their fellow jurors on these subjects. Though the Oklahoma court would have reversed if this testimony were admitted during the trial, the Oklahoma court has affirmed when the same testimony was introduced during deliberations – unsworn and in secret.

The Oklahoma Decision's interpretation of "extraneous prejudicial information" perpetuates a conflict among the States on a federal question that lies at the heart of the 7th and 14th Amendments. While a jury's verdict should be protected from excessive outside attacks, courts should with equal vigilance guard against verdicts that are tainted from within by jurors who are both predisposed *and trained* to not only ignore a court's instructions but manufacture evidence in the jury room, away from the court's discerning eye and immune to cross-examination. Therefore, Petitioners ask that this Petition be granted.

Respectfully Submitted,

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May 15, 2009

APPENDIX

APPENDIX A

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION III

[Filed Nov 7, 2008]

Case No. 104,134

MICKY A. SMITH and J. SCOTT BROWN as Co-Personal Representatives of the ESTATE OF ELIZABETH ASHLEY SMITH, Deceased, and the ESTATE OF NOAH SCOTT SMITH, Deceased; and, J. SCOTT BROWN, as Personal Representative of the ESTATE OF THOMAS ASHTON BROWN, Deceased,

Plaintiffs / Appellants,

and

MARCUS ALLEN AUSTIN, as INDEPENDENT EXECUTOR of the ESTATES of MILTON ANDREW AUSTIN and THELMA SUSIE AUSTIN,

Intervenor-Plaintiff / Appellant,

vs.

FORD MOTOR COMPANY, a Delaware corporation; REYNOLDS FORD, INC., an Oklahoma corporation; and FIVE STAR FORD, INC., an Oklahoma corporation,

Defendants / Appellees.

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA
HONORABLE TOM A. LUCAS, JUDGE

AFFIRMED

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MICHAEL L. CARR, MICHELLE B. SKEENS,
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Five Star Ford, Inc.

OPINION BY BAY MITCHELL,
VICE-CHIEF JUDGE:

Plaintiffs/Appellants Mickey A. Smith and J. Scott Brown, as Co-Personal Representatives of the Estate of Elizabeth Ashley Smith, deceased, and the Estate of Noah Scott Smith, deceased, and J. Scott Brown, as Personal Representative of the Estate of Thomas Ashton Brown, deceased (Plaintiffs), and Marcus Allen Austin, as Personal Representative of the Estates of Milton Andrew Austin and Thelma Susie Austin, deceased (intervenor), collectively "Appellants," appeal from an Order denying their Motion for New Trial subsequent to a jury verdict in favor of Defendants/Appellees Ford Motor Company and Reynolds Ford, Inc. (Ford Defendants) in a wrongful death/manufacturer's products liability action arising from an automobile collision.[1] The Appellants' primary contention is that specific acts of juror misconduct

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[1] Plaintiffs and Intervenor (collectively "Appellants") filed a combined brief-in-chief on appeal. They sought permission to file a 60 page brief, which was granted by the Oklahoma Supreme Court in its June 4, 2007 Order. Appellees Ford Motor Company and Five Star Ford, Inc. likewise filed a joint answer brief and obtained permission to file a 60 page brief. Reynolds Ford filed a separate answer brief. Appellants filed a Motion to Retain Appeal in Supreme Court, which was denied by Order of the Oklahoma Supreme Court on January 19, 2007.

resulted in the defense verdict requiring reversal.[2] Additionally, Appellants argue the trial court erred by (1) giving certain jury instructions and refusing to give others; (2) admitting certain statements (identified by the parties as "dying declarations") of the deceased Thomas Ashton Brown to emergency personnel prior to his death; (3) failing to strike the testimony of expert witness Robert Pascarella; (4) granting Reynolds Ford's Motion for Summary Judgment on the issue of its negligence; and (5) by refusing to permit Appellants' expert witnesses to testify regarding items not in evidence.

Facts and Procedural History

This action arose from a motor vehicle accident that occurred on July 26, 2003 on U.S. Highway 64/87 in New Mexico. Thomas Ashton Brown was driving a 2001 Ford Expedition, in which his sister, Elizabeth Ashley Smith and her 2-year-old son, Noah Scott Smith, were riding as passengers. The record reflects that Thomas Ashton Brown crossed the centerline into the opposing lane and struck an oncoming Ford F-250 pick-up truck, which was towing a trailer. Milton Andrew and Thelma Susie Austin occupied the pick-up truck. The collision, which was

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[2] Appellants filed a Motion for Oral Argument, which they argue is necessary in this case for them to more fully address juror misconduct and the particular defect at issue in this action." Appellants further contend the Oklahoma case law on juror misconduct is not well-developed. Appellees have each filed Objections to Appellants' Motion for Oral Argument respectively, noting the sufficiency of Oklahoma law on the subject of juror misconduct as well as the sufficiency of the parties' appellate briefs on all issues. We find the issues have been adequately briefed and oral argument would not materially assist the Court. *See Fulsom v. Fulsom*, 2003 OK 96, n. 10, 81 P.3d 652. Therefore, Appellants' Motion for Oral Argument is denied.

nearly head-on and occurred while both vehicles were traveling at highway speed, tragically resulted in the death of all five individuals in both vehicles.

Alleging that a defect in the Expedition caused the accident and resulting deaths, Appellants asserted claims against Ford Motor Company as the manufacturer of the Expedition, Reynolds Ford, Inc., the dealer which sold the Expedition to Micky and Elizabeth Ashley Smith, and Five Star Ford, Inc., which had serviced the Expedition. Micky and Elizabeth Ashley Smith had purchased the Expedition from Reynolds Ford in Norman, Oklahoma two days prior to the subject collision.

Prior to trial, Reynolds Ford, Inc. filed a Motion for Summary Judgment on the issue of negligence, which the trial court granted. Subsequently, the case proceeded to trial against the remaining Ford Defendants on the theory of a defective bearing and/or a missing cotter pin (a.k.a. cotter key) on the left front wheel of the Expedition, which allegedly caused the Expedition to veer left uncontrollably. Ford Defendants presented evidence that the accident was caused by driver negligence and not by a defect in the vehicle. After receiving instructions and deliberating for two days, the jury returned a verdict in favor of Ford Defendants on all claims. Specifically, the jury found that the negligence of the driver Thomas Ashton Brown was the sole and direct cause of the accident and they attributed 100% of the negligence to him. Additionally, the jury found the 2001 Expedition did not have a defect and was not unreasonably dangerous, the Ford Defendants were not negligent in its design or manufacture of the Expedition, and Five Star Ford was not negligent in its inspection and repair of the Expedition. The trial court subsequently

entered judgment in favor of all Defendants on September 21, 2005.

Plaintiffs and Intervenor thereafter filed a Motion for New Trial, arguing juror misconduct as a primary basis for the Motion. Despite Defendants' objections, a hearing was held during which several jurors testified to determine whether "extraneous prejudicial information" was improperly considered by the jurors during deliberation in violation of 12 O.S. 2001 §2606(B). The trial court denied the Motion for New Trial based upon a finding that the jurors "simply discussed the evidence as they understood it based on their knowledge and experience." Appellants appeal from the denial of their Motion for New Trial.

Standard of Review

"A trial court is vested with broad legal discretion in granting or denying new trial, and unless it clearly appears that the trial court erred in some pure simple question of law or acted arbitrarily, its judgment will not be disturbed on appeal." *Dominion Bank v. Masterson*, 1996 OK 99, ¶16, 928 P.2d 291, 294 (emphasis added).

The trial court's determination of no juror misconduct was free of error.

Appellants contend that jurors, and particularly the jury foreman, committed acts of misconduct constituting prejudicial error in this case. Specifically, Appellants complain that the jury foreman, who was an aircraft and auto mechanic, improperly introduced his own "expert testimony" into the deliberations by demonstrating a theory of how damage to the subject wheel bearing occurred during the impact of the accident. He used a "tin can analogy" based upon his own mechanical knowledge and expertise to explain how

various components fit and work together. Appellants characterize the foreman's conduct during deliberations as the equivalent of improper outside influence and/or evidence presented to the jury outside the courtroom proceedings. Appellants claim two other jurors similarly injected their mechanical knowledge into the discussion in support of the foreman's theory, which further added to the alleged substantial prejudice.[3]

The trial court permitted a post-verdict hearing permitting jurors to testify concerning their internal

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[3] Appellants additionally argued in their Motion for New Trial that jury deliberation included jurors' speculation over matters outside the evidence, particularly concerning the cause of the accident, *i.e.*, that an animal may have distracted Mr. Brown, causing him to cross the center line. We note it is proper for jurors to draw inferences from the evidence and it is inevitable that in some cases inference will turn to speculation. *See Walker v. Ison Transp. Services, Inc.*, 2007 OK CIV APP 14, ¶11, 152 P.3d 894, 896, *cert. denied*. "[S]peculation is distinguishable from those instances where jurors independently and improperly introduce into deliberations matters purporting to possess evidentiary probity and weight." *Id.* Appellants' appellate brief-in-chief refers to a discussion, which may have occurred during deliberations concerning the effect a verdict might have on car prices or insurance premiums. The transcript of the hearing provides that when questioned about such a discussion, the foreman testified, "I remember something about that, but I couldn't even come close to telling you who, when, or where that was said." (Transcript of hearing, January 4, 2006, p. 135). Several other jurors testified that they had no recollection of such a discussion during deliberations. We find the evidence inconclusive whether the jury deliberations included speculation concerning the effect of a verdict on car prices or insurance premiums. Even if such speculation occurred, such speculation does not meet the standard of "extraneous information" as contemplated by §2606(B). *See Walker*, 2007 OK CIV APP 14, ¶12, 152 P.3d at 896.

deliberations and discussions in accordance with 12 O.S. §2606(B), which permits such testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[4] *Id.* A trial court's determination subsequent to hearing on a motion for new trial based upon a party's allegation of juror misconduct "will not be disturbed [on appeal] where there is evidence reasonably supporting such finding." *Harris v. Boggess*, 1927 OK 80, ¶0, 255 P. 685, 685-86 (Syllabus by the Court, ¶2).

Appellants cite *Willoughby v. City of Oklahoma City*, 1985 OK 64,706 P.2d 883, in support of their argument that extraneous prejudicial information or outside influence was improperly brought to bear on the jury here. They argue the jury here improperly considered outside information provided via "seminar" conducted during deliberations by the "expert" jurors, and the parties were deprived of the opportunity to cross-examine the "experts" regarding such "evidence." In *Willoughby*, a juror conducted an independent investigation which allegedly involved obtaining opinions from experts and other witnesses outside the deliberation room and thereafter providing such information to the other jurors. No such investigation outside the deliberations occurred here. The foreman testified he used the tin can analogy in order to help explain his view of the evidence presented at trial. Several jurors had no recollection of the analogy. There is no evidence suggesting that any

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[4] This statutory provision is considered the single exception to the common law rule, which bars jurors from being heard to impeach a verdict of a jury upon which he or she served. *See Walker*, 2007 OK CIV APP 14, ¶5, ¶7, 152 P.3d at 895.

of the jurors here brought any outside materials into the deliberations, nor were any improper independent experiments performed.

The record reflects the jury deliberated and reached a verdict based upon the evidence presented at trial rather than upon any improper outside influence. While Appellants complain about certain jurors' use of their personal background and experience in mechanics during deliberations, such background and experience was fully disclosed during voir dire.[5] The jurors were instructed to use their common sense, and in doing so, every juror brought his/her own set of experiences and background to the deliberations process. The mere fact that some jurors sitting on a particular jury may have experience or knowledge particularly relevant to the issues in the case does not disqualify them from active participation in deliberations, much less amount to prejudicial juror misconduct. The record discloses that deliberations in this case were conducted as they were "intended to be, and should be, private, frank, and free discussions of the questions under consideration." *Stade v. Bodycote Thermal Processing, Inc.*, 2004 OK CIV APP 70, ¶6, 99 P.3d 733, 735.

While Appellants cite much case law from outside the jurisdiction on this issue, Oklahoma law is clear that a juror's own experience and background does not constitute "extraneous prejudicial information," which would improperly impact a jury's verdict. *See*

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[5] The record discloses no attempt by Appellants to strike the alleged "expert" jurors for cause during voir dire. Generally, when a defendant fails to challenge a prospective juror for cause, he waives any subsequent claim regarding the fitness of that panelist to serve on the jury. *Harris v. State*, 2004 OK CR 1, 84 P.3d 731.

Hawkins v. State, 2002 OK CR 12, ¶45, 46 P.3d 139, 148. Rather, "extraneous prejudicial information" is that which is "information injected into the deliberation process from the outside." *Id.* (emphasis added). Where jurors, as in this case, bring their own expertise into the deliberation process, such personal experience cannot be construed as 'extraneous prejudicial information." *See Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (holding that a juror allegedly holding herself out as an expert to fellow jurors during deliberations was merely using her own personal experience, which did not constitute "extraneous prejudicial information")[6]

The record is absent any evidence of extraneous prejudicial information or outside influence on the jury to warrant the granting of a new trial. The trial court's finding that the jurors "simply discussed the evidence as they understood it based on their knowledge and experience" rather than upon extraneous prejudicial information or outside influence is supported by the evidence and Oklahoma law. The denial of Appellants' Motion for New Trial on the basis of juror misconduct is affirmed.

The Jury was properly instructed on the applicable law.

Appellants contend the trial court erred in providing certain jury instructions and refusing to provide

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[6] In *Marquez v. City of Albuquerque*, the alleged "extraneous prejudicial information" was the juror's personal experience with training police dogs and the case involved the alleged excessive use of force by the use of a police dog. *See also Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989) (holding that a juror's personal familiarity with reading x-rays was not extraneous prejudicial information).

others. "The test upon review of an instruction improperly given or refused is whether there is a probability that the jurors were misled and thereby reached a different result than they would have reached but for the error." *Woodall v. Chandler Material Co.*, 1986 OK 4, ¶13, 716 P.2d 652, 654. Instructions are considered as a whole to determine whether the instructions reflect Oklahoma law on the relevant issue. *Nealis v. Baird*, 1999 OK 98, ¶15, 996 P.2d 438, 444. "A judgment will not be disturbed on appeal unless it appears reasonably evident that the jury was misled by the allegedly erroneous instruction." id. If competent evidence supports the verdict, we will not disturb it because of erroneous instructions unless it appears reasonably certain that the jury was misled. *Teague v. United Truck Service*, 1972 OK 97, ¶14, 499 P.2d 380, 384.

Instruction numbers 16(A), 17 and 29

Appellants contend the trial court erred in the instructions to the jury on negligence *per se* (instruction numbers 16(A) and 17)[7] in combination with the com-

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[7] Instruction # 16A provided as follows: It is the duty of every operator of a vehicle to exercise ordinary care in keeping a lookout consistent with the safety of other persons." Instruction # 17 provided as follows:

> In addition to the duty to exercise ordinary care there are also duties imposed by statutes. If you find that Plaintiffs violated any one of the following statutes and the violation was the direct cause of the injury, then such violation in and itself would make such person negligent. There were in force and effect in New Mexico at the time of the occurrence the following statutes:
>
> (1) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, and where practicable, entirely to the right of the center thereof.

parative negligence instruction (instruction number 29). Appellants argue that because the jury was given the negligence *per se* instruction, they were given no choice but to find Mr. Brown negligent. Additionally, they argue these instructions somehow resulted in the jury not being allowed to consider a legitimate reason for Mr. Brown being in the left lane (*i.e.*, passing) or that a defect in the vehicle (the left front wheel bearing forced him there).

Preliminarily, we note the evidence reflects the propriety of a negligence *per se* instruction, given the undisputed fact the Expedition crossed the center line into oncoming traffic at the time of the accident. In New Mexico, where the accident occurred, it is illegal to drive left of the center line. *See* N.M. Stat. §66-7-308(A).[8] "[W]here either party pleads and submits proof of a violation of a statute . . . an instruction advising the jury that such violation is negligence *per se*, is proper." *Dowell, Inc. v. Layton*, 1953 OK 187, ¶27, 261 P.2d 885, 890-91. A violation of the statutory rules of the road is negligence *per se* warranting such an instruction if the injury complained of was caused by the violation, was the type intended to be prevented by the law, and the injured party was a member of the class meant to be protected by the law. *See Boyles v. Oklahoma Natural Gas Co.*, 1980 OK 163, ¶14, 619 P.2d 613, 618; *Shoopman v. Travelers Ins. Co.*, 1974 OK 6, 518 P.2d

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[8] This statute, which requires New Mexico motorists to drive on the right side of the road was intended to prevent harm such as head-on collisions or sideswiping of opposite moving traffic. *See Archibeque v. Homrich*, 88 N.M. 527, 543 P.2d 820 (explaining the impropriety of a negligence *per se* instruction in a case *not* involving a head-on-collision or sideswipe).

1108. A negligence *per se* instruction was appropriate under the facts and circumstances of this case.

The negligence *per se* and comparative negligence instructions do not mandate a finding that Mr. Brown's actions were the direct cause of the collision. The jury was instructed on the Appellants' theories of the case as well. The instructions permitted the jury to find that a defect or a mechanical failure, and not driver negligence, caused the vehicle to go left of center causing the collision. There was evidence to support such a finding. The jury, however, found otherwise. It was not imperfect instructions which caused the jury verdict in favor of Appellees. Rather, the verdict appears to have been based upon consideration of the evidence presented by all the parties and application of pertinent law as accurately communicated via the instructions. The negligence *per se* and comparative negligence instructions were given along with numerous instructions properly instructing the jury as to the Appellants' theories.[9] The instructions, considered as a whole, accurately reflect Oklahoma law and it does not appear the jury was misled thereby.

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[9] Instructions given pertinent to the Appellants' theories of recovery included as follows: #11 (burden of proof applicable to party claiming manufacturer's products liability), #12 (definition of defective product), #13 (definition of 'unreasonably dangerous"), #14 (instruction that the subject vehicle was not a "Quality Check" vehicle and "Quality Check program" is not relevant to Plaintiffs' claims), #15 (defect/direct cause/more than one direct cause), #16 (intervening cause). Additionally, general instructions regarding the law of negligence (instruction #27 and #28) were given as well as instructions on damages (instructions #18-23).

Appellants argue the trial court erred in its refusal to provide three proposed instructions, which would have allegedly prevented the jury from otherwise being misled by instructions numbers 16(A), 17 and 29.[10] Additionally, Appellants contend the trial court erred in refusing to give ten "miscellaneous instructions."[11] The instructions read to the jury, considered

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[10] The three proposed instructions were entitled "comparative negligence prohibited," "contributory negligence, affirmative defense of misuse of product," "'sole' cause vs. 'superceding' cause." A review of these proposed instructions reveals they are confusing, misleading, cumulative, and/or do not instruct on law applicable in the case. In any event, we fail to see how the giving of these instructions would have prevented any confusion or misleading of the jury as to instruction numbers 16(A), 17, and 29, nor is it probable the jury would have reached a different verdict had these proposed instructions been given. The trial court correctly refused to give these instructions.

[11] Eight of the ten "miscellaneous instructions" requested by Appellants were withdrawn by counsel during the jury charge conference because they were cumulative of other instructions and/or because the instruction was no longer applicable (*i.e.*, instructions related to claims which were no longer pertinent given the Appellants' withdrawal of the particular claim). Appellants waive any review of alleged error regarding these instructions, which Appellants withdrew. *See Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶24, 786 P.2d 1230, 1236 (providing "a party who fails to preserve an issue for appeal by objecting in a timely manner. . . to instructions given, or by neglecting to offer a proper instruction has waived review of that issue [on appeal]."). Specifically, Plaintiffs' counsel withdrew the following proposed jury instructions: (1) The Issues in the Case-No Counterclaim; (2) Product Defective if No Warning Given; (3) Adequacy of Warnings; (4) Conduct of Defendants; (5) Deceit-Elements; (6) Material Fact Defined; (7) Deceit Defined; (8) Tests of Caulfield and Pascarella. The two proposed miscellaneous instructions, which were not withdrawn by counsel and therefore, properly preserved for review on appeal are as follows: (1) Manufacturer's Knowledge as Experts; (2) Manufac-

as a whole, clearly set forth the jurors' duties, the issues in the case, the applicable law, the burdens of proof, the elements of recoverable damages, and the applicable defenses. We find the given instructions to be clear, not misleading, and incapable of being construed as precluding the jury from finding the Expedition defective and/or Ford Defendants negligent. It appears reasonably certain the jury reached its verdict (finding the percentage of negligence attributable to Mr. Brown at 100%) not on the basis of any confusion arising from the instructions, but rather upon its finding of facts and conclusions drawn from consideration of all the evidence presented at trial. No error is shown in the trial court's determinations pertaining to the jury instructions.

The proposed dying declarations instruction

The trial court allowed evidence of the dying declarations of Mr. Brown.[12] Appellants argue the admission of the dying declarations was error, and that the error was compounded when the court refused to give

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turer's Duty to Warn. These instructions are confusing, misleading, and regarding the duty to warn instruction, the refusal to give it conforms to the evidence and the fact that other instructions regarding duty to warn were withdrawn. Further, it is not probable the jury was misled and would have reached a different verdict if these instructions had been given. There was no error in refusing to give these proposed instructions.

[12] These statements were made to an emergency medical technician, who treated Mr. Brown at the scene of the accident. The emergency medical technician was deposed, wherein she testified to the content of the statements, including Mr. Brown's expression of fault for the accident (It's all my fault. It's all my fault. I'm going to die. I'm going to die I'm going to die."). A videotape of the medical technician's deposition testimony was offered for admission by the Plaintiffs at trial, and was played for the jury.

a curative instruction[13] regarding the dying declarations. We disagree.

The trial court properly admitted the statements of Mr. Brown. The statements are clearly admissible pursuant to the dying declarations exception to the hearsay rule. Title 12 O.S. Supp. 2003 §2804(B)(2) provides that "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death" is not excluded by the hearsay rule if the declarant is unavailable. The statements made by Mr. Brown were to the effect he believed he was going to die and his statements concerning fault directly and clearly related to the circumstances surrounding his

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[13] The proposed dying declarations instruction entitled 'Dying Declarations of Thomas Ashton Brown" is as follows:

> You will hear testimony regarding certain statements made by decedent Thomas Ashton Brown while he was being transported by ambulance from the scene of the accident. It is up to you, as the finders of fact, to determine what weight, if any, to give to these statements. In determining the weight you should give to these statements, you should consider the context in which these statements were made, such as: (a) Mr. Brown's physical condition; and, (b) Mr. Brown's mental condition. Finally, you should consider any and all other statements he made following the accident, which, taken together, might shed light on the reliability of the statements in issue.
>
> If you decide that the statements of Thomas Ashton Brown indicate some degree of fault on his part, the laws of Oklahoma do not allow you to consider this when deciding the amount of damages to award to Elizabeth Ashley Smith or Noah Scott Smith, as they were fault-free passengers, and Milton Andrew Austin or Thelma Sue Austin, as they were the fault-free driver and passenger in a separate vehicle.

imminent death. We find no error in the trial court admitting these statements.

Regarding Appellants' proposed curative instruction, the trial court refused to give it on the basis that it was argumentative and cumulative of other instructions. Additionally, the trial court determined the proposed instruction might be construed by the jury as an improper commentary of the court on the credibility of the statement. Appellants demonstrate no prejudice in the failure to give this instruction. Furthermore, Appellants cite no authority in support of their argument that the trial court erred in refusing the requested curative instruction. Argument unsupported by persuasive authority or citation will not be considered. *Abel v. Tisdale*, 1980 OK 161, ¶18, 619 P.2d 608, 611.

The proposed "issue preclusion" instruction

Appellants contend the trial court erred in its refusal to instruct the jury on "issue preclusion based on discovery misconduct." While Appellants' Brief-in-Chief provides in exhaustive detail matters pertinent to what it refers to as "systematic discovery abuse" in the litigation of this matter, they fail to set forth specifically what instruction they contend the trial court erred in refusing to read to the jury. Although we can deduce that it relates to Appellants' Exhibit number 183,[14] which is comprised of documents relevant to an

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[14] The documents included in Plaintiffs' Exhibit #183 contained the following statements: "Cross Truck Line Action-Wheel Bearings (P131 Job #1 implementation) Problem: Current bearing design will not meet 150K Mile requirement without adjustment, noise or failure. . . . Replace current loose/adjustable wheel bearings with cartridge design with improved seal." The record reflects the trial court granted Plaintiffs' motion in limine pertaining to this statement in Plaintiffs' Exhibit

order of the trial court, Appellants fail to set forth the actual proposed instruction to permit review for assessment of error, if any. The record reveals that an initial requested instruction related to "issue preclusion" was withdrawn and a substituted handwritten proposed instruction was provided, but apparently was never made a part of the record. The transcript from the charge conference shows that Appellants' attorney requested a jury instruction related to issue preclusion, which was refused. However, because the content of the requested instruction is not included in the record on appeal, we have no means of knowing its contents, whether it was misleading, confusing, argumentative and/or whether it contained a correct statement of the law. Thus, we find no error in the trial court's failure to give the instruction. *Wofford v. Mental Health Services, Inc.*, 1997 OK 116, ¶16, 946 P.2d 1149, 1153.

The trial court properly permitted witness Pascarella's testimony.

Appellants contend the trial court committed reversible error when it allowed Robert Pascarella to testify as a corporate representative and/or expert witness for Ford Motor Company upon denial of Appellants' Motion to Strike and Motion for Sanctions. Appellants' argument on this issue includes the rehashing of a discovery dispute concerning the inadequacy of Mr. Pascarella as a corporate representative witness arising from his lack of knowledge and/or unfamiliarity with respect to several subject categories identified in Plaintiffs' deposition notice pursuant to

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#183 to the extent that Defendants were precluded from, by oral testimony, refuting or contradicting the language contained in the above-referenced statement.

12 O.S. §3230(C)(5)[15]. The record demonstrates that Ford had objected to the 38 areas of examination requested in the notice on the basis that they were vague, unduly burdensome, overly broad and ambiguous. The record further reflects that the parties thereafter had agreed to a modification of the areas of examination and that Mr. Pascarella would be presented as a corporate representative to testify on the limited topics in his §3230(C)(5) deposition notice. Given the fact that the parties resolved this discovery dispute and limited the categories of examination of Mr. Pascarella by consent, the Appellants cannot now complain of any error of the trial court with respect to Mr. Pascarella's failure to adequately address 19 of the 38 areas of examination noted in the original notice.[16]

We apply a clear abuse of discretion standard to the admissibility of expert witness testimony. *See Worsham v. Nix*, 2006 OK 67, ¶39, 145 P.3d 1055, 1068, "It is incumbent upon a trial judge in his/her role as the 'gatekeeper' of the evidentiary process to screen evidence, *i.e.*, to determine its relevance and reliability." *Cities Service Co. v. Gulf Oil Corp.*, 1999

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[15] This is the statutory provision pertaining to notice to a corporate deponent.

[16] The record contains correspondence of counsel reflective of an agreement that Mr. Pascarella's testimony as a corporate representative would be limited to the wheel bearings, hub assembly and cotter pin issues in the 2001 Ford Expedition. Counsel for Ford identified at least one additional corporate representative knowledgeable on other issues pertinent to the §3230(C)(5) deposition.

OK 14, ¶32, 980 P.2d 116, *cert. dismissed*, 528 U.S. 1014 (1999).[17]

Appellants assert the trial court erred in permitting Mr. Pascarella, an automotive mechanical engineer, to testify regarding metallurgy, given his admission he was not an expert on that subject. A review of the trial transcript, however, reveals Mr. Pascarella did not testify on the subject of

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[17] Appellants additionally argue (in part VII of their appellate Brief-in-Chief) the trial court abused its discretion in excluding Appellants' expert witness testimony regarding information contained within Ford's Master Owners Relation System ("MORS"). Appellants cite 12 O.S. §2703, which authorizes expert witnesses to base their opinions on inadmissable evidence, as authority for the admissibility of testimony concerning the content of such otherwise inadmissable material. First, we note Appellants fail to demonstrate, by specific reference in the record, the content of the MORS to permit meaningful review. Further, Appellants fail to demonstrate whether MORS is of a type of data reasonably relied on by experts in the particular field in forming opinions or inferences on the subject. Admission of such evidence relied upon by experts in formulating their opinions is within the discretion of the trial court. *See Ake v. State*, 1989 OK CR 30, ¶31, 778 P.2d 460, 467. Furthermore, counsel for Plaintiffs represented to the court during a pre-trial hearing on the parties' motions in limine on August 17, 2005 that this MORS evidence was hearsay and that it would be used "strictly in the punitive damages case that we get to that, Your Honor. . . . [T]hose are records that we offer in the second phase of this trial to show that they knew that people would be killed before my clients were killed." Despite these assurances concerning the limited use of this evidence, Appellants nevertheless sought expert testimony thereon during the negligence phase of trial. The trial court, in its exercise as gatekeeper in the screening of evidence, sustained the defense's objections thereto. The Appellants have failed to demonstrate any abuse of discretion in the trial court's exclusion of testimony concerning MORS.

metallurgy.[18] In fact, during his trial testimony, Mr. Pascarella expressly deferred to another expert witness on the subject of metallurgy. Clearly, Appellants' allegation of error on this point is without merit.

Finally, Appellants argue the trial court erroneously permitted Mr. Pascarella to present his "driving tests" to the jury in support of his opinion that the forces of the accident broke the wheel bearing. Appellants cite no authority in support of this allegation of error and we therefore will not consider it. *See Abel v. Tisdale*, 1980 OK 161, ¶18, 619 P.2d 608, 611.

After reviewing the testimony in this case, we find the testimony of Robert Pascarella would assist the jury in understanding the issues in the case and in determining liability in this contested case.[19] The court did not abuse its discretion by allowing Mr. Pascarella to testify.

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[18] Metallurgy is defined as the knowledge and study of metals and their properties in bulk and at the atomic level. AMERICAN HERITAGE DICTIONARY 789 (2d ed. 1985).

[19] Appellants' argument on this issue includes a statement to the effect that they "had brought to the trial court's attention facts that strongly suggested Mr. Pascarella had either planted or facilitated the planting of misleading evidence at the accident scene." Expert witnesses were cross-examined regarding the finding of previously missing parts (including a cotter pin) at the scene of the accident in August, 2004. Expert witness testimony included commentary that the late discovery of the parts was surprising, but none had evidence to suggest that the parts did not come from the subject vehicle or that the parts were planted. It was a question of fact for the jury whether the parts found at the scene came from the subject vehicle.

The trial court properly granted summary judgment to Reynolds Ford on the issue of negligence.

Appellants maintain the trial court erred in its pretrial granting of Reynolds Ford's Motion for Summary Judgment on the issue of negligence.[20] The appellate standard of review of a trial court's grant of summary judgment is *de novo*. *Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, 920 P.2d 122. This Court will examine the pleadings and evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact. *Ross v. City of Shawnee*, 1984 OK 43, ¶7, 683 P.2d 535, 536. All inferences and conclusions to be drawn from the evidentiary materials must be viewed in the light most favorable to the non-moving party. *Id.*

Appellants' theory of negligence against Reynolds Ford, the dealership from which the Smiths purchased the used Expedition, was generally that it failed in its inspection of the vehicle to discover the alleged defect in the inner wheel bearing. The evidence presented in support of Appellants' defect theory (*i.e.*, that there was "a fatigue failure of the inner bearing, the race on the inner bearing cone, left front wheel, that precipitated the accident")[21] was

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[20] Although Appellants list the trial court's granting of Reynolds Ford's Motion for Summary Judgment on the issue of fraud as an allegation of error in their Petition in Error, they failed to brief the issue. We note that Appellants listed numerous allegations of error in their Petition in Error which were not briefed. Allegations of error not contained within arguments in appellate brief are waived. *Johnson v. Ford Motor Co.*, 2002 OK 24, 45 P.3d 86.

[21] (Depo Tr. Dr. Robert Block at 10). Appellants' expert witnesses also described the defect as a fracture or crack, which started below the surface of the bearing race and progressively moved to the surface.

discerned by Appellants' expert witnesses upon examination of parts under an electron microscope. The record reflects inspections were performed on the Expedition at Reynolds Ford including a test drive and multi-point inspection[22] in July, 2003, which revealed no defects in the Expedition. Appellants' expert witness metallurgist testified that Reynolds Ford could not have found the alleged fracture in the inner bearing race upon inspection if it had not reached the surface. Appellants presented no evidence that the fracture, if any, had reached the surface at the time the vehicle was at Reynolds Ford.

Given the aforementioned facts, Reynolds Ford argued Appellants failed to establish the existence of a defect and therefore, cannot be held liable for failure to discover same upon inspection. Secondly, Reynolds Ford argued that even if there was a failure in the left front inner bearing race on the Expedition at the time the vehicle was at Reynolds Ford, the evidence clearly demonstrates that a reasonable inspection by Reynolds Ford could not have revealed such a latent defect on the inner race.

While a used car dealer is not an insurer of safety of the vehicles it sells, it has a duty to exercise

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[22] Appellants' argued that had Reynolds Ford performed a "Quality Checked" 115-point inspection, it would have discovered the defect, although they failed to produce evidence to support this assertion. The record demonstrates that the vehicle was not in the Quality Checked program. Additionally, the record reflects deposition testimony of the Reynolds Ford technician who performed a brake inspection of the vehicle as well as a check for loose bearings (this involved grasping the wheel at the top and at the bottom and shaking). Appellants' experts testified this inspection would have revealed a loose or "bad" bearing, if any.

reasonable or ordinary care in making inspections and tests to discover defects which would make the used car dangerous to those who may use it or come in contact with it. *Hembree v. Southard*, 1959 OK 91, 339 P.2d 771; *see Bower v. Corbell*, 1965 OK 163, 408 P.2d 307, 314 (quoting with approval *McKinney v. Frodsham*, 57 Wash.2d 126, 356 P.2d 100, which determined an automobile dealer "is not required to dismantle the car to make inspection, but is required to observe the vehicles as received, observe whether they operate properly, and investigate and check the operation of parts or appliances with respect to safety before delivery.").

In this case, Reynolds Ford's inspection went well beyond a mere cursory inspection of the vehicle, but stopped short of dismantling the vehicle and inspecting parts under a microscope. Even Appellants' expert witnesses acknowledge it would not have been part of the standard inspection procedure to remove the wheel bearings to inspect them, and that a crack in the inner bearing race, if detectable at all, would only be detectable by extraordinary measures. The evidence was undisputed that Reynolds Ford satisfied its legal duty to perform a reasonable inspection and was entitled to judgment as a matter of law. The trial court correctly granted Reynolds Ford's Motion for Summary Judgment on the issue of negligence.

AFFIRMED.

BUETTNER, P.J., and BELL, J., concur.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

[Filed February 17, 2009]

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

104,134 Mickey A. Smith and J. Scott Brown, as co-personal representatives of the Estate of Elizabeth A. Smith, Deceased and the Estate of Noah Scott Smith, Deceased, et al v. Marcus Allen Austin, independent executor of the Estates of Milton Andrew Austin and Thelma Susie Austin v. Ford Motor Company, et al
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Taylor, V.C.J., Hargrave, Opala, Watt, Winchester, Reif, JJ.
DISSENT: Colbert, J.
NOT PARTICIPATING: Kauger, J.

104,564 Earl & Barbara Patzkowsky, et al v. State of Oklahoma, ex rel., Oklahoma Board of Agriculture, et al
Petition for certiorari is denied.
CONCUR: Taylor, V.C.J., Hargrave, Opala, Watt, Winchester, Colbert, Reif, JJ.
DISSENT: Edmondson, C.J., Kauger, J.

105,136 The Lions Club of the City of Del City, Oklahoma, a charitable corporation v. Larry Derryberry, et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

105,602 Harry ("Pip") Blue and Brenda Blue dba P.B.R. Equipment Sales & Services, an

Oklahoma corporation v. CVS Pharmacy, Inc., a foreign corporation doing business in Oklahoma
Petition for certiorari is denied.
ALL JUSTICES CONCUR

105,647 Don Marvin McKee v. Superior Pavement, et al
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Taylor, V.C.J., Opala, Kauger, Watt, Winchester, Colbert, Reif, JJ,
NOT PARTICIPATING: Hargrave, J.

105,850 Hillcrest Medical Center, et al v. Patrick Collins and The Workers Compensation Court
Petition for certiorari is denied.
ALL JUSTICES CONCUR

106,622 Kim Annette Mashunkashey v. The Honorable B. David Gambill, Judge of the District Court of Osage County, 10th Judicial District, State of Oklahoma, et al
Application to assume original jurisdiction is denied.
All requested relief is denied.
ALL JUSTICES CONCUR

/s/ James Edmonson
CHIEF JUSTICE

(2)

No. 08-1430

FILED
JUN 19 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MICKY A. SMITH and J. SCOTT BROWN, *et al.*,

Petitioners,

v.

FORD MOTOR COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Third Division

RESPONDENT FORD MOTOR COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an unpublished opinion, the intermediate appellate state court affirmed a state trial court's opinion that jurors' background and experience are not extraneous prejudicial information under OKLA. STAT. tit. 12, § 2606(B).

The question presented here is whether this Court has jurisdiction to review a state court decision interpreting only state law in an appeal arising from a civil jury trial where no federal question was ever raised, argued or decided.

LIST OF PARTIES

The additional respondents in this case are Five Star Ford, Inc., an Oklahoma corporation, and Reynolds Ford, Inc., an Oklahoma corporation.

CORPORATE DISCLOSURE STATEMENT

Respondent Ford Motor Company is a publicly-held corporation whose shares are traded on the New York Stock Exchange. Ford Motor Company has no parent corporation. No publicly-held company owns more than 10% of Ford Motor Company's stock.

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JURISDICTION

This Court lacks jurisdiction to review decisions by state courts interpreting state law where no federal question was ever raised, argued or decided. 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

This appeal arises out of a nearly head-on collision between a 2001 Ford Expedition and a 2000 Ford F-250 traveling at highway speeds. The petitioners sued respondents in Oklahoma state court alleging state law tort causes of action sounding in products liability, negligence, and breach of warranties.

The petitioners' statement of the case purports to detail what they allegedly "proved" at trial. Whether these statements are considered mere inferences or factual misstatements, they are not relevant to whether this Court should grant certiorari. Even if all of the petitioners' statements about the evidence at trial were true, there would still be no basis for this Court to review the unpublished decision below because no federal question was ever raised, argued or decided.

Whether the Expedition had an alleged defect and the actual cause of the crash were hotly contested factual issues at trial. The parties spent three weeks presenting testimony by fact witnesses and numerous

experts and admitting thousands of pages of exhibits in support of their respective positions. The jurors ultimately rejected what the petitioners here claim they "proved." The trial court entered judgment in favor of all respondents based on the jury's verdict.

Relying on affidavits of petitioner Micky Smith's sister and investigators hired by petitioners' counsel, the petitioners sought a new trial alleging that the mechanical background and experience of three jurors constituted "extraneous prejudicial information" under OKLA. STAT. tit. 12, § 2606(B). It is undisputed, however, the jurors fully disclosed their background and experience during voir dire. The petitioners have never alleged that the jurors misrepresented their background or experience or their ability to decide the case without bias.

Four months after trial and over the respondents' objections, the trial court heard testimony from several jurors, petitioner Micky Smith's sister and the petitioners' hired investigators. The petitioners offered no evidence the jury was exposed to extraneous prejudicial information, and the jurors testified their deliberations were based only on the evidence presented. Consequently, the trial court denied the petitioners' motion for new trial and ruled that the jurors "simply discussed the evidence as they understood it based on their knowledge and experience." *See* Order Denying Motion for New Trial at 2 (Nov. 29, 2006).

The petitioners appealed. In an unpublished opinion the Oklahoma Court of Civil Appeals rejected the petitioners' argument that a juror's background constitutes extraneous prejudicial information:

> The record reflects the jury deliberated and reached a verdict based upon the evidence presented at trial rather than upon any improper outside influence. While Appellants complain about certain jurors' use of their personal background and experience in mechanics during deliberations, such background and experience was fully disclosed during voir dire. The jurors were instructed to use their common sense, and in doing so, every juror brought his/her own set of experiences and background to the deliberations process. The mere fact that some jurors sitting on a particular jury may have experience or knowledge particularly relevant to the issues in the case does not disqualify them from active participation in deliberations, much less amount to prejudicial juror misconduct. The record discloses that deliberations in this case were conducted as they were "intended to be, and should be, private, frank, and free discussions of the questions under consideration." *Stade v. Bodycote Thermal Processing, Inc.*, 2004 OK CIV APP 70, ¶ 6, 99 P.3d 733, 735.

See Smith v. Ford Motor Co., No. 104,134, slip op. at 8-9 (Okla. Civ. App. Nov. 7, 2008) (footnote omitted)

(Pet. App. at 9a). The Oklahoma Supreme Court denied further review without an opinion.

REASONS FOR DENYING THE PETITION

SUMMARY OF REASONS

Any federal question, if such even exists in this appeal, has been waived by the petitioners' failure to raise it below. The petitioners' attempt to raise a federal question by making a passing reference to the Seventh and Fourteenth Amendments to the United States Constitution for the first time in the petition for a writ of certiorari is untimely. And even if the petitioners had raised those amendments below, they are not applicable in this appeal from a civil jury trial in state court involving only a question of state law.

The Oklahoma intermediate appellate court's unpublished opinion below is consistent with long-standing Oklahoma precedent. The court below did not err in applying the facts to the law, and the jury's verdict is supported by the evidence.

For these reasons, and as detailed below, Respondent Ford Motor Company respectfully submits that this Court should deny the petition for a writ of certiorari.

I. PETITIONERS WAIVED ANY FEDERAL QUESTION BY FAILING TO RAISE IT BELOW.

This Court will not consider claims on certiorari neither raised nor determined below. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). The petitioners never raised a federal question at any stage of the proceedings below, and thus, have waived any federal question.

II. NO FEDERAL QUESTION IS PRESENTED IN THIS APPEAL FROM A CIVIL JURY TRIAL IN STATE COURT INTERPRETING STATE LAW.

This Court's jurisdiction to review a final judgment by the highest court of a state is limited to those cases involving a federal question. 28 U.S.C. § 1257. This appeal arises from a civil jury trial in state court involving only questions of state law. No federal question was ever raised, argued or decided below.

In their petition to this Court (and for the first time in this case), the petitioners cite the Seventh and Fourteenth Amendments as grounds to set aside the judgment. The petitioners fail, however, to suggest how or why either amendment applies under the circumstances of this case or was otherwise violated below. The petitioners' reliance on these amendments is misplaced.

A. The Seventh Amendment's Right to Jury Trial Only Applies to Civil Cases in Federal Courts.

The Seventh Amendment applies only to courts of the United States and not to state courts. *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877) ("We have held over and over again that art. 7 of the amendments to the Constitution of the United States relating to trials by jury applies only to the courts of the United States."). This Court's interpretation of the Seventh Amendment has not changed. *See, e.g., Melancon v. McKeithen*, 345 F. Supp. 1025, 1048 (E.D. La.) (Seventh Amendment does not guarantee a right to trial by jury in state civil cases), *aff'd*, *Hill v. McKeithen*, 409 U.S. 943 (1972). "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure." *Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931). Instead, a state may establish its own procedures and practices regarding the conduct of civil litigation including the right to trial by jury. *Id.*

B. In Civil Jury Trials in State Courts, the Fourteenth Amendment Only Guarantees Due Process According to that State's Laws.

It is unclear whether petitioners are alleging a deprivation of due process with regard to their motion for new trial or suggesting that due process incorporates the substantive protections of the

Seventh Amendment in state civil jury trials, a suggestion this Court has historically and repeatedly rejected.

To the extent the petitioners suggest they were deprived due process, there is still no basis for review by this Court. The petitioners never argued below that they were deprived of due process guaranteed under either the Oklahoma or the United States Constitution. Any due process challenge has been waived.

Further, "[d]ue process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." *Walker*, 92 U.S. at 93. This Court's "power over that law is only to determine whether it is in conflict with the supreme law of the land." *Id.*

The Oklahoma Constitution guarantees litigants the right to trial by jury. OKLA. CONST. art. 2, § 19 ("right of trial by jury shall be and remain inviolate"). The petitioners received their jury trial.

The petitioners made a passing suggestion below that the alleged juror misconduct violated their right of access to the courts without prejudice under Oklahoma's Constitution. *See* OKLA. CONST. art. 2, § 6 ("The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."). The court below rejected all of the

petitioners' alleged errors. "All questions arising under the Constitution of the State alone are finally settled by the judgment below." *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875).

Further, the procedure utilized below is wholly consistent with this Court's interpretation of due process for allegations of juror misconduct. *See, e.g.*, *Smith v. Phillips*, 455 U.S. 209, 217-18 (1982) (post-trial evidentiary hearing sufficient due process for deciding allegations of juror misconduct). As this Court has explained, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Id.* at 217. "[I]f in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system." *Id.* at 218.

III. THIS APPEAL ONLY INVOLVES A QUESTION OF STATE LAW.

The question presented below was whether the jurors' subjective background and experience constituted extraneous prejudicial information under OKLA. STAT. tit. 12, § 2606(B). No federal question was ever raised, argued or decided below.

"[C]omity and respect for federalism compel [this Court] to defer to the decisions of state courts on issues of state law," which practice "reflects [this

Court's] understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring, joined by Scalia, J. and Thomas, J.). This is especially true with regard to allegations of juror misconduct. *See McDonald v. Pless*, 238 U.S. 264, 266 (1915) ("In the very nature of [alleged juror misconduct] the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules."). The question of what constitutes extraneous prejudicial information under Oklahoma law is not reviewable by this Court.

This Court will only review a state court's interpretation of state law in "extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975). The only plausible "extreme circumstance" would be if the court below interpreted Oklahoma law beyond what a fair reading of that law would permit so as to constitute a denial of due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352-55 (1964). The petitioners have not suggested any extreme circumstance in this case. Any such suggestion would be untenable because the lower court's decision is consistent with longstanding precedent by Oklahoma appellate courts. *See* Proposition VI.B below.

IV. THE PETITIONERS' SUGGESTION THAT THE RIGHT TO A FAIR TRIAL IS UNDER ASSAULT BY AGENDA-DRIVEN JURORS IS IMMATERIAL.

The petitioners suggest that the constitutional right to a fair and impartial jury is under assault by agenda-driven jurors. Pet. at 10-13. It is not clear how the petitioners' suggestion raises a question reviewable by this Court. The question of agenda-driven jurors was never raised below and, thus, cannot form a basis for this Court's jurisdiction.

Further, as this Court has recognized, voir dire is the prime safeguard "we have relied on since the beginning" to identify juror bias. *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). The parties below engaged in nearly four days of voir dire, with counsel for the petitioners using the majority of that time. *See* Trial Tr. Vols. IV, VI-X. The three jurors with mechanical background and experience fully disclosed that experience during voir dire. *See* Trial Tr. Vol. IV at 413:15-420:12; Trial Tr. Vol. VII at 697:20-702:15, 706:17-707:17, 710:21-711:15, 779:20-785:20; Trial Tr. Vol. VIII at 868:9-21, 894:19-896:10, 901:10-904:2; and Trial Tr. Vol. IX at 970:17-974:14. The appellate court below recognized that the "background and experience was fully disclosed during voir dire" and the petitioners never attempted to strike those jurors for cause. *Smith*, No. 104,124, slip op. at 8-9 n.5 (Pet. App. at 9a).

The petitioners fail to identify even a scintilla of evidence any juror had any agenda, the verdict was affected by any agenda, or that any juror was exposed to the propaganda which the petitioners reference. The petitioners never alleged any of the jurors failed to disclose any material fact or provided false testimony about their background or secreted some subversive agenda.

V. THE PETITIONERS' SUGGESTION THAT A CONFLICT EXISTS BETWEEN STATE COURTS IS IMMATERIAL.

The petitioners suggest that the courts of last resort of various states interpret extraneous prejudicial information differently. Pet. at 14-21. Decisions by Oklahoma courts interpreting extraneous prejudicial information are not binding on the courts of any other states. The reverse is also true.

A conflict among lower courts involving questions controlled by state law is not a reason for granting certiorari. *See, e.g., Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). Because the alleged conflict, if it even exists, arises solely as a result of individual states applying their own laws, review by this Court is not warranted. *Id.*; *see also, e.g.*, Sup. Ct. R. 10(b).

VI. THE DECISION BELOW IS CORRECT.

Based on the unique facts presented during the post-trial hearing, the court below concluded the petitioners failed to present any evidence of

extraneous prejudicial information affecting the jurors' deliberations.[1] This Court defers to factual findings by state courts on direct review of state court judgments. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) (and cases cited therein); *see also* Sup. Ct. R. 10. Further, the factual determinations by the court below are supported by the record and consistent with Oklahoma law and this Court's jurisprudence.

A. The Jurors' Testimony Demonstrated that No Extraneous Prejudicial Information Influenced Their Deliberations.

The trial court heard testimony over the respondents' objections from jurors Bert Duke (Duke), Mary Harding (Harding), Glenda Wilson (Glenda Wilson), Charles Crane (Crane), Vera Beth Wilson (Vera Wilson), Jennifer Allen (Allen) and jury foreperson Clay Earl Melton (Melton). Transcript of Proceedings Had On January 4, 2006 at 1-151 (Juror Tr.).[2] The jurors testified their deliberations were not affected by extraneous prejudicial information.

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[1] The petitioners alleged numerous other errors in the motion for new trial and in subsequent appellate briefing. The court below rejected all of the petitioners' alleged errors. Alleged juror misconduct is the only issue raised here.

[2] The respondents objected to the jurors' testimony because Oklahoma law does not permit a party to impeach a verdict by examining the jurors' deliberation process. Specifically,

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Melton testified, "**We had nothing but what you gave us.**" Juror Tr. at 148:8 (emphasis added). He testified he did not need to "look anything up or do any research about" the evidence. *Id.* at 143:10-13, and 144:25-145:4. He did not "go out and buy any Timken bearings and try to do any type of experiment on [his] own." *Id.* at 145:5-8. None of the jurors brought anything into the deliberation room that was not evidence in the case. *Id.* at 145:12-16. None of the jurors went to the accident scene, brought any outside materials into the deliberations, or did any experiments on bearings. *Id.* at 148:5-8.

Melton further testified the deliberations were based only on the evidence presented at trial. Juror Tr. at 148:1-4. The other jurors agreed. Duke testified Melton did not discuss anything other than the

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Oklahoma law prohibits jurors from testifying "as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations." OKLA. STAT. tit. 12, § 2606(B). Instead, a "juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Id.* This Court recognizes that "the near-universal and firmly established common-law rule in the United States flatly prohibit[s] the admission of juror testimony to impeach a jury verdict," with an exception for situations involving allegations that extraneous influence affected the jury. *See Tanner v. United States*, 483 U.S. 107, 117 (1987).

evidence presented at trial. *Id.* at 44:8-11. Vera Wilson testified, "I think they were commenting on things that they heard from the witness stand." *Id.* at 85:5-7. She made her "decision on the evidence that was presented," and "all the time [she] was thinking about the evidence and weighing the evidence." *Id.* at 88:16-23. Allen testified she did not remember deliberations about evidence she "did not hear from the witness stand." *Id.* at 94:3-6.

The trial court concluded the jury considered only the evidence presented and rejected the petitioners' argument that the backgrounds of certain jurors constituted extraneous prejudicial information. The trial court found the jurors "simply discussed the evidence as they understood it based on their knowledge and experience." *See* Order Denying Motion for New Trial at 2 (Nov. 29, 2006). The Oklahoma Court of Civil Appeals affirmed in an unpublished opinion.[3] The court held there was "no

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[3] That the opinion below is unpublished demonstrates that not only does this appeal not present an important federal question, the court below did not consider the questions decided important enough to warrant publication. Under Oklahoma law, an opinion is released for publication only if it:

> (1) Establishes a new rule of law or alters or modifies an existing rule;
>
> (2) Involves a legal issue of continuing public interest;
>
> (3) Criticizes or explains existing law;

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evidence suggesting that any of the jurors here brought any outside materials into the deliberations, nor were any improper independent experiments performed." *Smith*, No. 104,124, slip op. at 8 (Pet. App. at 8a-9a). The record showed "the jury deliberated and reached a verdict based upon the evidence presented at trial rather than upon any improper outside influence." *Id.* at 8-9 (Pet. App. at 9a).

B. Jurors' Background and Experience Are Not Extraneous Prejudicial Information Under Oklahoma Law.

The decision below is consistent with Oklahoma law. "[I]information coming from the juror's own subjective experiences and background" is not extraneous prejudicial information. *Hawkins v. State*, 46 P.3d 139, 148 (Okla. Crim. App. 2002). Rather, extraneous prejudicial information is "information

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(4) Applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state;

(5) Resolves an apparent conflict of authority; or

(6) Constitutes a significant and non-duplicative contribution to legal literature:

(a) by an historical review of law; or

(b) by describing legislative history.

Okla.Sup.Ct.R. 1.200(a). Furthermore, "[b]ecause **unpublished opinions** are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked **shall not be considered as precedent by any court**." *Id.* at 1.200(b)(5) (emphasis added).

injected into the deliberation process from the outside." *Id.*

Jurors are supposed to bring their background and experience into the deliberation process. *Nalley v. Kellwood Co.*, 867 P.2d 1336 (Okla. Civ. App. 1993), *cert. denied*, Jan. 18, 1994. In *Nalley*, the losing party sought a new trial based on jurors' remarks during deliberations in which supposedly extraneous information and personal views were brought into the jurors' discussion. *Id.* at 1338. The court held the record, "contrary to showing extraneous influence or misconduct, indicate[s] the jury acted as the process intended – the jurors brought their thoughts and backgrounds to their deliberations." *Id.*

Similarly, in *American National Bank & Trust Co. of Sapulpa v. BIC Corp.*, 880 P.2d 420, 424 (Okla. Civ. App. 1994), the court held jurors' discussions during deliberations of their experiences with lighters similar to those at issue in a products liability action did not constitute extraneous prejudicial information. During deliberations one juror mentioned an experience with a lighter that would not extinguish and another juror mentioned an experience with a lighter that flared up and singed his mustache. *Id.* The court found these instances, "unconnected to BIC and not involving injury to person or property, do not constitute juror misconduct warranting new trial." *Id.*

Oklahoma law provides examples of what constitutes extraneous prejudicial information. Examples include situations where, unlike here: (1) the jury

considered the results of a juror's independent investigation, *Willoughby v. City of Okla. City*, 706 P.2d 883, 887 (Okla. 1985); (2) the jury received exhibits that were not introduced into evidence, *Negrate v. Gunter*, 285 P.2d 194, 195-97 (Okla. 1955); (3) the jurors had possession of an exhibit excluded by the trial court and independently viewed the premises where the accident occurred, *Swift & Co. v. Kirkley*, 131 P.2d 998, 998-99 (Okla. 1942); (4) the jurors had a memorandum used by counsel in support of argument but not admitted into evidence, *Peoples Fin. & Thrift Co. v. Ferrier*, 129 P.2d 1015, 1017-18 (Okla. 1942); (5) the jury consulted "outside reference material, including but not limited to Bibles or other religious documents, dictionaries, or any other reference book," *Glossip v. State*, 29 P.3d 597, 605 (Okla. Crim. App. 2001); (6) the jury had been exposed to improper polygraph test evidence, *Weatherly v. State*, 733 P.2d 1331, 1335-36 (Okla. Crim. App. 1987); (7) the bailiff made statements to the jury during deliberations, *Smith v. State*, 656 P.2d 277, 285 (Okla. Crim. App. 1982); and (8) the jury received information about a witness' deposition which had been excluded, *Bledsoe v. Truster*, 839 P.2d 673, 676 (Okla. Civ. App. 1992), *cert. denied*, Oct. 28, 1992.

The petitioners failed to present any evidence showing extraneous prejudicial information. Instead, the evidence showed the jurors brought only their background and experience into the deliberation process. The state court's interpretation of extraneous

prejudicial information under Oklahoma law is consistent with longstanding Oklahoma precedent.

Presumably all jurors bring their background and experience into the deliberation process. It is impossible to separate jurors from their background and experience. That is the essence of the jury system:

> **Jurors are not mere automatons. Some latitude must be left them to present to their fellow jurors their arguments and their reasons for their beliefs based on the evidence. They do not shed their personalities and their experiences of life when they begin their deliberations.**

Hankins v. State, 213 N.W. 344, 347 (Neb. 1927) (emphasis added) (no misconduct where juror with experience operating cash registers discussed during deliberations fact that cash registers do not make mistakes).

The deliberation process necessarily includes the collective background and experience of all the jurors. The court below did not err.[4]

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[4] The petitioners suggest the lower court restricts the scope of extraneous prejudicial information to a physical object taken into the jury deliberation room. Pet. at 14. The petitioners fail to provide a pinpoint cite to support that suggestion. The court below does not pronounce such a hard line distinction between internal and external influences. Instead, the court merely examined the record and affirmed the trial court's ruling that the petitioners failed to present any evidence of extraneous

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C. The Petitioners Make Factual Misstatements Regarding the Jurors' Deliberations.

The petitioners misstate the jurors' testimony and claim certain jurors conducted an experiment, performed extraneous mathematical equations, conducted a teaching seminar, read regulations outside of deliberations and gave expert testimony in the deliberation room.[5] Most of the juror testimony on which the petitioners rely was the result of improper and leading questions by the petitioners' counsel during a post-trial hearing. Contrary to the petitioners' misstatements, the jury discussed the evidence and the inferences to be drawn from it based on their backgrounds and experience.

1. Melton did not perform an experiment using an exhibit not admitted into evidence.

The petitioners state Melton conducted an experiment using an exhibit (a "nearby soup or

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prejudicial information. *Smith*, No. 104,124, slip op at 6-10 (Pet. App. at 6a-10a). As this Court recognizes, the distinction between external and internal influences is "not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation." *Tanner*, 483 U.S. at 117.

[5] These same misstatements were addressed in detail by the respondents below and rejected by the lower courts.

beverage can") not offered into evidence. Pet. at 8. Melton did not perform an "experiment" or use an exhibit not admitted into evidence. Rather, Melton used an "**analogy**" of a tin can to explain his understanding of the evidence presented at trial. Juror Tr. at 117:12-118:21 (emphasis added). Melton elaborated:

> The analogy of the tin can on the arm, if you look inside the hub where everybody can see the same thing and there was in-depth discussion by the experts of how the marks got there and there were marks – basically identical marks on the outer race of the outer wheel bearing and the inner race of the inner wheel bearing. The only difference between them is they were 180 degrees apart.

Id. at 138:2-9. Melton testified "I think I did that to explain how the marks would have gotten on the opposite race and 180 degrees out." *Id.* at 143:17-18. Melton's analogy was consistent with the trial testimony of respondents' expert witness regarding Brinell marks[6] appearing 180 degrees apart on the bearing race found at the accident scene. *Compare id.* at 138:2-9 and 143:17-18 *with* Trial Tr. Vol. XXX at 4324:6-4326:3. Furthermore, jurors Harding, Glenda Wilson, Crane, and Vera Wilson did not even recall Melton's tin can analogy. Juror Tr. at 51:15, 62:3-5, 71:22-25 and 81:11-21.

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[6] A Brinell mark is a distinctive mark created when one piece of metal impacts into another piece of metal with significant force.

2. There was no competent evidence Melton performed mathematical equations not admitted into evidence.

The petitioners state Melton performed mathematical equations to educate other jurors about how forces and force vectors cause bearings to break. This assertion is based on Duke's testimony in response to a leading question by the petitioners' counsel. Juror Tr. at 46:11-16. On direct examination, however, Melton himself denied performing any mathematical equations during deliberations. *Id.* at 140:23-25. No other juror confirmed Duke's testimony. *Id.* at 57:21-25, 66:13-16, and 87:8-20.

3. There was no competent evidence Crane researched or discussed federal regulations not admitted into evidence.

The petitioners contend Crane discussed federal regulations not offered into evidence. Pet. at 8-9. In the proceedings below, the petitioners identified Melton as the individual who testified Crane had done some reading about dial indicators.[7]

Melton merely testified, "[Crane] said he had read something that showed [a dial indicator] was for

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[7] A dial indicator is an instrument used to measure small distances including the amount of play in a wheel for evaluating bearings.

the trucking industry." Juror Tr. at 121:13-14. Melton elaborated, however, that he could not be sure if Crane had read something. *Id.* at 121:15-17. He further testified Crane only mentioned some regulation in "general terms" and Melton could not even remember if Crane used the word "regulation" or "law." *Id.* at 122:10-16. The petitioners never questioned Crane about discussing or reading regulations during deliberations. *Id.* at 70:21-78:8. It is undisputed Crane disclosed during voir dire his opinion that grabbing the wheel and rocking it to "check it for end play" is an appropriate method for evaluating bearings but then noted that "the proper way . . . is put a dial indicator on it." Trial Tr. Vol. VII at 781:2-782:13.

Further, Melton testified the deliberations regarding the use of dial indicators were based on the evidence admitted at trial. Juror Tr. at 122:1-9 and 146:20-147:5. When Vera Wilson testified about the jurors' deliberation regarding regulations and dial indicators, she stated, "**I think they were commenting on things that they heard from the witness stand**." *Id.* at 84:17-85:7 (emphasis added).

The jurors' testimony regarding their deliberations is consistent with the evidence presented at trial. Anthony Skipper, the wheel bearing manufacturer's representative, testified dial indicators are not required for vehicles like the Expedition. Trial Tr. Vol. XXIX at 4075:18-4080:14; and Trial Tr. Vol. XXVIII at 4028:19-4036:25. Other witnesses at trial also testified that dial indicators were not required

for passenger vehicles like the Expedition. Trial Tr. Vol. XIII at 1590:13-17; and Trial Tr. Vol. XIV at 1757:1-13.

4. Melton did not conduct a teaching seminar on force vectors.

The petitioners claim Melton conducted a seminar for the other jurors on force vectors. Pet. at 8. Melton testified he did not discuss principal direction of force or force vectors during deliberations, and his discussions of the evidence were based on his common sense. Juror Tr. at 115:9-13 and 140:17-22. Melton's testimony is consistent with the other jurors' recollections. *Id.* at 46:17-19, 58:23-25, 61:19-24 and 81:8-10.

The jurors' deliberations were not a teaching seminar. Duke testified, "Well, we didn't teach nobody. We just explained stuff that the other ones had questions on." Juror Tr. at 39:17-18. Harding testified, "we all discussed backyard mechanics, shade tree mechanics." *Id.* at 52:2-3. Glenda Wilson testified, "I don't know that he [Melton] was trying to teach it. He was just trying to explain the best he could." *Id.* at 63:17-18. Vera Wilson testified, "Well, different people had different theories, and we talked about those theories." *Id.* at 82:12-13. Similarly, Allen testified, "**I feel like that, you know, we were allowed to take our common knowledge into the room, and that's all anybody inserted into the conversation was things that they had as their**

common knowledge. . . . " *Id.* at 98:6-10 (emphasis added).[8]

5. Melton's comment that he influenced his fellow jurors is immaterial.

The petitioners claim Melton bragged that the petitioners might have prevailed if he or Crane had not been on the jury. Pet. at 8. The petitioners cite the hearsay testimony of an investigator hired by the petitioners' counsel rather than Melton's own testimony. When asked about this statement, Melton testified, "If I said anything even close to that, it wasn't verbatim. But I'm sure that Mr. Crane and I explained certain mechanical aspects." Juror Tr. at 129:18-20.

Any juror could state that his or her involvement on the jury made a difference. That certainly does not constitute extraneous prejudicial information under

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[8] The petitioners' counsel told the jurors at trial to use their common sense when listening to the evidence and when deliberating the case. During opening statements, the petitioners' counsel told the jurors, "When you go in the jury room and begin to do your deliberations in this case, one of the things that you will not check at the door is your common sense." Trial Tr. Vol. XI at 1391:20-23. The petitioners' counsel repeated this sentiment during closing, telling the jurors: "One, of course, is just use your common sense. None of you just got to town yesterday. We all have life experience and common sense things that help us make decisions every day. Use your common sense." Trial Tr. Vol. XXXVI at 5112:8-12.

Oklahoma law. *See Bledsoe*, 839 P.2d at 676 ("intra-jury influences" are not extraneous prejudicial information).

6. There was no competent evidence that the jurors favored a verdict for the petitioners until hearing Melton's analogy.

The petitioners claim that when the jurors focused on the evidence, the majority favored a verdict for the petitioners. Pet. at 8. The petitioners never submitted any credible evidence that the jurors originally intended a verdict for the petitioners. Instead, the petitioners cite to portions of the jurors' testimony where they discussed their deliberations in detail and what discussions influenced their decisions.

Each juror must express his or her understanding of the evidence. These "intra-juror" influences are not extraneous prejudicial information under Oklahoma law. *Bledsoe*, 839 P.2d at 676.

The trial court found no evidence of extraneous prejudicial information. Under Oklahoma law, the trial court's ruling on juror misconduct following an evidentiary hearing "'will not be disturbed [on appeal] where there is evidence reasonably supporting such finding.'" *Thompson v. Krantz*, 137 P.3d 693, 698 (Okla. Civ. App. 2006) (quoting *Harris v. Boggess*, 255 P. 685, 685-86 (Okla. 1927)). Deference to the trial court's decision based on personal observations of the testifying jurors is consistent with this Court's jurisprudence. *Patton*, 467 U.S. at 1038

(weighing juror testimony "is essentially one of credibility, and therefore largely one of demeanor" and "the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'").

The decision below, based on the jurors' testimony, is correct. There is no error for this Court to review.

VII. THE TRIAL EVIDENCE SUPPORTS THE JURY'S VERDICT.

The petitioners suggest Melton and Crane "used their influence to procure a verdict that is diametrical to the evidence presented at trial." Pet. at 21. It is possible the jurors disbelieved the petitioners' experts' untested theories. Indeed, the petitioners' experts offered "final" opinions in reports and depositions and then changed those opinions after respondents proved they were wrong. Trial Tr. Vol. XX at 2868:25-2879:24. The evidence at trial was not as one-sided as the petitioners suggest. If it was, it favored the respondents. As demonstrated below, the respondents' evidence supports the jury's verdict.

On July 24, 2003, Petitioner Micky Smith and his wife, Elizabeth Ashley Smith, purchased the 2001 Expedition used from Reynolds Ford.[9] Two days later

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[9] The previous owners had the Expedition serviced at Five Star Ford after noticing a humming noise coming from the front end. A mechanic replaced the right front outer bearing and

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in the early morning hours Mrs. Smith, along with her brother Thomas Ashton Brown and her infant son, began a trip from Norman, Oklahoma to the family's vacation home in Colorado. The accident occurred late afternoon that same day in New Mexico on an undivided, two-lane highway with painted lines and no center median.

The petitioners sued the respondents alleging the inner bearing[10] of the Expedition's left front wheel suffered a fatigue fracture which caused the Expedition to suddenly veer left into a head-on collision with a Ford F-250. The respondents' evidence presented at trial disproved the petitioners' defect allegation.

The evidence at the accident scene did not support the petitioners' defect allegation. The respondents presented evidence showing that if there had been a bearing failure, there would have been

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cleaned and replaced the right inner bearing. The mechanic reset the pre-load for the left front wheel and would have inspected, repaired or replaced the left front bearings if they had been loose at that time. The previous owners then drove the Expedition another 8,900 miles without experiencing any steering, braking or handling problems, before trading it in for a newer Expedition.

[10] Each of the front wheels on the Expedition has two bearings, an inner and an outer bearing. The inner and outer bearings each consist of an outer race, tapered rollers, and an inner race. The wheel hub assembly includes the grease cap, the cotter pin, nut retainer, the spindle nut, the bearing retainer washer, and the outer and inner bearing.

pre-impact debris along the highway before the point of impact in the direction from which the Expedition was traveling. However, the component parts from the left front wheel, including the cotter pin and pieces of the bearing, were found at the Expedition's post-accident point of rest, not along the highway before the accident site. The respondents' evidence also showed that when bearings seize, the wheel stops rotating which would have left marks on the tire and the road prior to impact. However, there were no marks on the left front tire or on the roadway prior to impact. Additionally, there was no physical evidence on the roadway that Mr. Brown applied the Expedition's brakes before impact. There were, however, tire marks on the roadway from the on-coming Ford F-250.

The petitioners claim the Expedition "suddenly" crossed the center line of the highway. Pet. at 2. While that was petitioners' theory, respondents presented evidence that the Expedition crossed the center line at a gradual 3 to 4 degrees. Trial Tr. Vol. XXVI at 3698:8-20.

The condition of the component parts at issue did not support the petitioners' defect allegation. The respondents' metallurgical expert, Dr. Edward J. Caulfield, examined the bearing race using an electron microscope and testified the Brinell marks on that race were caused by the tremendous forces generated in the crash. Dr. Caulfield supported his hypothesis with testing, unlike the petitioners' experts who offered no testing to support their defect

allegation. First, Dr. Caulfield conducted drop-tests on an exemplar bearing race and determined that the markings on the exemplar and the subject bearing race were consistent. Second, he installed a fractured inner front bearing race into an exemplar Ford F-150. The exemplar vehicle was then test-driven for more than 330 miles. The drivers did not experience any braking, steering or handling problems. Additionally, the size of the fracture remained constant. A second bearing race was fractured all the way through and installed on an Expedition driven for 180 miles around a test track without any problems.

Contrary to the petitioners' suggestion, Pet. at 7, Dr. Caulfield did not reverse his position, stumble over himself, defy Timken or disregard Timken's recommended procedures. Trial Tr. Vol. XXXIII at 4710:10-4713:16. Furthermore, Dr. Caulfield re-affirmed that the marks observed on the Expedition's bearings were Brinell marks caused by the tremendous forces generated in the crash. Trial Tr. Vol. XXX at 4336:16-23.

The respondents' automotive mechanical engineer, Mr. Robert Pascarella, conducted impact testing on an exemplar hub assembly and testified the damage to the subject bearings was consistent with impact damage rather than fatigue. He also testified the braking system of the Expedition was operational before the crash and, consequently, the bearing did not fail and cause the crash.

That the alleged defect did not cause the crash was further supported by the testimony of Mr. Skipper from Timken, the bearing manufacturer. Mr. Skipper testified there was no evidence on the bearing of heat damage, *i.e.*, that the bearing had seized to the spindle. He also testified the rollers found at the crash site did not appear to be under any stress, and they were not discolored from heat. He further testified there was no evidence of a bearing malfunction and that the subject bearing would have been functioning at the time of impact. Mr. Skipper also testified the damage to the Expedition's bearings was not caused by fatigue.

In response to questions by the petitioners' counsel, Mr. Skipper, who has more than 37 years in the design and performance of wheel bearings, testified a fracture all the way through the bearing race is **only** possible from an impact. He explained it is impossible for a bearing to experience a fatigue fracture driving down the road because the stress mechanism is not present. He also testified a bearing cannot break into pieces in the hub assembly due to fatigue. Rather, Mr. Skipper testified, it would take a considerable impact to fracture a bearing assembly.

It was also undisputed this was a severe accident. Dr. Greg Smith, the respondents' accident reconstruction expert, testified this was the most severe accident he had ever reconstructed. Dr. Smith opined the Expedition was traveling 61 mph and the Ford F-250, towing a trailer, was traveling 56 mph at

impact. After the nearly head-on collision, the Expedition was knocked backward and rolled over to its point of rest. Dr. Smith testified there was extensive damage to the Expedition including: (1) the left side frame rail was buckled and bent; (2) the entire engine compartment and drive shaft were pushed rearward; (3) the front axle had been rotated; (4) the entire front end had been twisted to the right; and (5) grass and scrapes going in different directions suggested multiple rolls.

Dr. Smith testified the left front wheel impacted the ground twice during the accident sequence. Dr. Smith testified it was the "slam down" of the left front wheel that broke the bearings in the left front wheel. Other experts for respondents also testified the left front wheel bearing broke as a result of the tremendous accident forces.

The petitioners claim they proved that Ford's Critical Concern Review Group was aware of a wheel bearing failure rate of 25%. Pet. at 5. This claim was based on a document produced by Ford Motor Company which stated, "Cross Truck Line Action – Wheel Bearings (P131 Job # 1 implementation) Problem: Current bearing design will not meet 150K Mile requirement without adjustment, noise or failure." It was undisputed, however, this document related to the Ford Super Duty line of vehicles (*i.e.*, those designated as the PN131) which does not have the same front wheel bearings as the Expedition at issue in this case. Trial Tr. Vol. XXXII at 4555:11-24.

The petitioners claim there were 2,742 separate warranty complaints for failed bearings in Ford light trucks. Pet. at 5. Here, the petitioners are referring to summaries of bearing warranty records printed from Ford's warranty database.[11] Those records included vehicles, such as the E-350, which utilize different bearing designs. *See* Defendant Ford Motor Company's Motion to Strike Plaintiffs' Exhibit 60.1 (Sept. 7, 2005). Those records merely showed that bearings are a serviceable component part. None of those warranty records referenced any other incident where a fatigue fracture in an inner bearing race led to a catastrophic failure causing a sudden loss of control. *Id.* at 2655:22-2656:10. Indeed, none of the experts had ever seen a similar incident. Trial Tr. Vol. XVI at 2193:11-21; Trial Tr. Vol. XVIII at 2486:23-2487:21; Trial Tr. Vol. XXIX at 4125:17-25; and Trial Tr. Vol. XXXII at 4552:1-15.

The petitioners claim if the Expedition had been one of Ford's "Quality Checked" used vehicles, it would have undergone a 115-point inspection by Ford-certified mechanics. Pet. at 3. It was undisputed,

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[11] The petitioners' witness originally represented to the court and the jury that there were 4,190 warranty records. Trial Tr. Vol. XIX at 2652:12-16. Ford's counsel had those warranty records counted and discovered there were only 2,742 warranty records. Trial Tr. Vol. XXXIV at 4731:11-4732:13. Consequently, the trial court gave a curative instruction regarding the number of warranty records. *See* Jury Instructions Given to the Jury this 8th Day of September, 2005 by Tom A. Lucas, District Judge (Sept. 12, 2005).

however, the subject Expedition was not part of Ford's "Quality Checked" program. Trial Tr. Vol. XV at 1988:16-22; and Trial Tr. Vol. XXI at 3012:14-22. Further, the 115-point inspection does not even mention "wheel bearings." Trial Tr. Vol. XV at 1879:12-1880:16.

The petitioners claim respondents Five Star Ford and Reynolds Ford should have advised the Expedition's original owners to bring the Expedition in for a 30,000-mile check-up because "either dealership would have routinely checked all wheel bearings." Pet. at 3. It was undisputed, however, the 30,000-mile scheduled maintenance of the 2001 Ford Expedition did not include inspection of the wheel bearings. Trial Tr. Vol. XIII at 1582:4-7; and Trial Tr. Vol. XV at 1890:7-15.

Using a special verdict form, and answering interrogatories, the jury found that: (1) the 2001 Ford Expedition did not have a defect and was not unreasonably dangerous; (2) Ford Motor Company was not negligent in its design or manufacture of the Expedition; (3) Five Star Ford was not negligent in its repair of the Expedition; (4) Mr. Brown, the driver of the Expedition, was negligent; (5) Mr. Brown's negligence was the direct cause of Mr. Brown's death; and (6) Mr. Brown's negligence was the sole cause of the accident. Consequently, the jury attributed 100% of the fault to Mr. Brown. *See* Special Verdict Form (Sept. 9, 2005).

The evidence admitted at trial supports the jury's verdict. There is no error for this Court to review.

CONCLUSION

Respondent Ford Motor Company respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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IN THE

Supreme Court of the United States

MICKY A. SMITH AND J. SCOTT BROWN, *et al.*,
Petitioners,

v.

FORD MOTOR COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents mistakenly argue that 28 U.S.C. §1257(a) does not grant this Court certiorari jurisdiction over this matter (Resp. Br. at 5-9).

In *ASARCO Inc. v. Kadish*, 490 U.S. 605, 606 (1989), this Court held that a "state court's erroneous interpretation of federal statutes" confers standing on parties affected by that state court ruling to invoke this Court's jurisdiction.

Of the four cases the Oklahoma Court of Civil Appeals relies on to support its unduly restrictive definition of "extraneous information," two are federal cases interpreting Fed. R. Civ. P. Rule 606(b), which is virtually identical to 12 Oklahoma Statutes §2606(B).[1] [Pet. App. 10a]

The first federal case is *Marquez v. City of Albuquerque*, 399 F.3d 1216 (C.A.10 2005), a 42 U.S.C. §1983 action in which the plaintiff claimed a police officer's use of a police dog during his arrest constituted excessive force (Id., p. 1219). The juror at issue, who had prior experience in training police dogs, made three assertions during deliberations: "(1) Police dogs do not bite unless the suspect is fleeing; (2) The injuries suffered by Marquez from the bite were not serious; and (3) Police dogs do not bite the first part of the body they come across." [Id., p. 1223] But these assertions were of no relevance to the issue before the jury because: (a) the 4th Amendment does not require use of the "least intrusive means" in the course of an arrest (Id., ¶8); and (b) not

---

[1] The only substantive difference between the two statutes is that the Oklahoma statute does not allow juror testimony on whether a mistake was made entering the verdict on the verdict form.

even violations of state law and police procedure generally constitute excessive force (Id., ¶9); therefore, (c) the only issue before the jury was whether the officer in question (not the dog) had acted reasonably (Id.).

The court should have known from these basic facts that *Marquez* was distinguishable from the instant case, because the actions of Messrs. Melton and Crane had a direct bearing on issues crucial to the jury's determination. Furthermore, the *Marquez* court based its holding principally on *U. S. ex rel. Owen v. McMann*, 435 F.2d 813 (C.A.2 1970),[2] a fair reading of which demonstrates that the *Marquez* court quoted it out of context:

> Here the alleged "extraneous prejudicial information" was the juror's personal experience with training police dogs. A juror's personal experience, however, does not constitute "extraneous prejudicial information." [citation omitted] As the Second Circuit stated, "the inquiry is not whether the jurors "became witnesses" in the sense that they discussed any matters not of record, but whether they discussed specific extra-record

---

[2] Petitioners would note in passing that *McMann* lends further support to our proposition that extraneous information can originate in the deliberation room: "There is no rational distinction between the potentially prejudicial effect of extra-record information which a juror enunciates on the basis of the printed word and that which comes from his brain. As we pointed out in *United States v. Crosby, supra*, 294 F.2d at 950, it is the 'nature of the matter and its probable effect on a hypothetical average jury,' not the source of the information or the locus of its communication, which determines whether the defendant has been prejudiced." [*McMann* at 820]

> *facts* relating to the defendant, and if they did, whether there was a significant possibility that the defendant was prejudiced thereby." *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 n. 5 (2nd Cir.1970) (emphasis and quotation marks in original); *see also Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir.1989) (holding that a juror's personal familiarity with reading x-rays was not extraneous prejudicial information). [*Marquez* at ¶11]

At issue in *McMann* were, not statements made by jurors about cardinal *evidence*, but statements made about the *character of the defendant* himself in a criminal prosecution (*McMann* at 815). Thus, the court in the case at bar should have discerned that *Marquez* was inapposite and, therefore, does not support the conclusion it reached in this case. By citing it in the particular fact-scenario of this case, the court has ascribed to Fed. R. Civ. P. Rule 606(b) an unduly restrictive definition of "extraneous prejudicial information."

Though, in footnote 6, the court in the case at hand correctly reports the holding in *Hard* (870 F.2d 1454) ("Hard 2"), it erroneously interprets the broader principles espoused therein, as well as the body of prior case law on which they are based, including a case decided by this very Court nearly half a century ago.

While the court in *Hard 2* did hold that a juror's experience in reading x-rays did not constitute extraneous prejudicial information (Id. at 1462), it did so only after remanding the matter to the trial court for further investigation into that particular juror's personal experience:

> In *Hard I* we held that if a juror's past experiences were **directly related to the litigation** . . . the discussion of those experiences would constitute extraneous information that could be used to impeach a jury's verdict. [Id., ¶8; emphasis added]

In that case, the petitioner asserted that a juror had used his background in x-ray interpretation to persuade his fellow jurors that the plaintiff's x-rays did not show a back injury (Id., ¶9). On remand, the trial court found the evidence inconclusive (Id.). Based on that finding, the court held:

> While **it is clearly improper for jurors to decide a case based on personal knowledge of facts specific to the litigation**, a basic understanding of x-ray interpretation falls outside the realm of impermissible influence.
>
> Irrespective of juror Fraser's alleged familiarity with x-rays, the jury had ample evidence from which to conclude that Hard's alleged back injury was not caused by the litigated accident. [Id., ¶10; emphasis added]

By contrast, Petitioners here demonstrated that Foreman Melton did not merely draw upon his general experience as an airplane mechanic. He imposed his superior knowledge of physics and forces upon deliberations, generating his own evidence in the jury room to convince his subordinate jurors of a theory—related to a fact that was not only specific but *pivotal* to the case—that contradicted the totality of evidence presented at trial, thus materially altering the verdict. In like manner, Juror Crane imparted to his fellow jurors the specter of federal regulations (per-

sonal experience) not admitted or even discussed at trial to contradict testimony regarding the use of dial indicators (a fact specific to the case).

In *Hard 1*, 812 F.2d 482 (C.A.9 1987), the court specifically held:

> Jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict. **Where, however, those experiences are related to the litigation, as they are here, they constitute extraneous evidence which may be used to impeach the jury's verdict.** [Id., ¶6; citations omitted; emphasis added]

The *Hard 1* court cited *Government of Virgin Islands v. Gereau*, 523 F.2d 140 (C.A.Virgin Islands 1975), in which the court held:

> **And where jurors consider evidence, in the form of either fact or opinion, which has not been introduced in court**, the confrontation and counsel rights of an accused are obviated as regards the particular evidence received. [Id., ¶9; emphasis added]

In turn, the *Gereau* court cited *Parker v. Gladden*, 385 U.S. 363 (1966), in which this Court held:

> . . . **the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel**. [text omitted] We have followed the undeviating rule that the rights of confrontation and cross-examination are among the fundamen-

> tal requirements of a constitutionally fair trial. [Id., ¶4, emphasis added]

The Court then rejected the argument that the statements at issue were harmless because (a) 10 jurors had testified they had not heard the statements and (b) only 10 votes were needed for a verdict, finding:

> . . . one of the jurors testified that she was prejudiced by the statements, which supports the trial court's finding that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant. [Id., ¶6; citations omitted]

Finally (¶5), this Court alluded to the bedrock principle coined by Justice Holmes a century ago:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. [*Patterson v. People of State of Colorado ex rel. Attorney General of State of Colorado*, 205 U.S. 454, 462 (1907)]

CONCLUSION

A diligent reading of the *Hard* cases should have alerted the court that (a) the extraneous information analysis must be performed on a case-by-case basis and (b) the facts of the present case warranted an in-depth inquiry. Had the court conducted such an inquiry, the facts in the record should have led it to a different conclusion about the actions of Foreman Melton and Juror Crane. By ignoring the wealth of authority on which *Hard 2* was based and merely using the holding in that particular fact-scenario to bolster its position, the court not only misconstrued Fed. R. Civ. P. Rule 606(b); it misused it altogether.

Plaintiffs therefore submit that this Court has jurisdiction to grant certiorari in this matter.

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